

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 931 OF 1989



BETWEEN:

DURAND AND BOWDEN (PTY) LTD PLAINTIFF

AND

J P LOGA (MALE) DEFENDANT

CORAM: **MSOSA J (MRS)**

Nyirenda, of Counsel for the plaintiff

ABenn Nampota, of Counsel for the Defendant
Official Interpreter

JUDGMENT

This is an application by the defendant for stay of execution of judgment pending appeal. It is made under the provisions of Order 59, rule 13 of the rules of the Supreme Court. The application is supported by an affidavit deposed to by the defendant himself. In the affidavit, the defendant states, among other things, that he has appealed against the judgment which was entered against him on 6th October, 1994. He also states that since judgment he has come into possession of certain correspondence which was not available during trial and that in view of this he will be applying to have new evidence adduced during appeal. The copies of the correspondence were attached to the affidavit. He further states that the appeal will be rendered nugatory if the judgment is executed now in view of the fact that the plaintiff is foreign based.

The application is opposed for several reasons. Firstly, the plaintiff contends that it is not certain that the defendant's application to adduce additional evidence will succeed having regard to the test that will have to be applied. Secondly, that even if the defendant is allowed to adduce additional evidence, it is likely that the appeal will not succeed. The plaintiff further argued that the fact that the plaintiff is based in South Africa should not be the only deciding factor but that other factors should be taken into consideration in order to determine whether special circumstances exist. It was also submitted that the defendant has on several occasions deliberately and purposefully prevented the plaintiff from getting its money. It has been stated that the defendant always wait until the plaintiff is about to get fruits of a judgment entered in his favour before he applies to



set the judgment aside. Two instances were cited in support of this. The first one is when he successfully applied to set aside a judgment in order to file his defence. Secondly that he obtained an order to vary an order striking out of the defence which the plaintiff had earlier on obtained. It has also been submitted that the defendant has deliberately not claimed his money from Burlington Freight Express. Incidentally during trial it became clear that it was open to the defendant to claim the value of the missing goods from Burlington Freight Express in whose custody the goods were when they missed.

I would like to deal first with the question on the two court orders that were made in favour of the defendant. I am of the view that it would not be fair to penalise the defendant in the present case on this point because the orders were made on merit. It was just unfortunate that the effect of those orders was that the plaintiff was denied the fruits of the judgment entered in his favour at that material time.

The general rule governing the execution of judgments is that the court does not make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled - see The Anne Lyle (1886) 11 P D 114 and Monk v Bartram (1891) 1 Q B 346. However, in the case of Wilson v Church ((No.2)(1879) 12 Ch. D 454, the court stated that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful is not nugatory. It is in the discretion of the court to grant or refuse a stay, although ordinarily the court will grant it where the special circumstances of the case so require.

The main question I have to decide is whether the application should be granted regardless of the fact that the plaintiff is resident outside jurisdiction and that if it gets the proceeds of the judgments it will be difficult to recover them. Counsel for the plaintiff has suggested that the proceeds should be paid to the plaintiff's legal practitioners with an order that they should not be externalized until the appeal is determined.

I have carefully considered all that has been submitted on behalf of the parties. I agree that indeed it might be difficult for the defendant to recover the money in the event of him succeeding in his appeal. However I feel this problem can be overcome if the money is retained within jurisdiction. Consequently, whilst refusing the application, I order that the judgment which the plaintiff obtained in this case should be executed. I further order that the amount recovered in consequence thereof should be retained within jurisdiction by the Legal Practitioners of the plaintiff until the appeal is determined.

The costs of this application are awarded to the plaintiff.

Made in Chambers this 6th day of January 1995 at Blantyre,



Mrs A S E Msosa
JUDGE