IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1002 OF 2000

KAMLESH JOGIBHAI PATEL ..... PLAINTIFF

VERSUS

MFUMU CLOTHING COMPANY LIMITED ..... DEFENDANT

CORAM: **D F MWAUNGULU (JUDGE)**
Tembenu, Legal Practitioner, for the plaintiff (appellant)
Msowoya and Nyasulu, Legal Practitioners, for the respondent (defendant)
Balakasi, Official Interpreter

Mwaungulu, J

ORDER

the appeal

This is a plaintiff's appeal against a registrar's ruling. On 11th April, 2000 the Deputy Registrar set aside the ex parte attachment of property before judgement order he made on 3 rd April 2000. The ex parte order attached all the defendant's property of whatever description situate at Title Number Chichiri 225 pending determination of the plaintiff's action. It restrained the defendant from removing, disposing, concealing, making away with or handing over to others property in the premises. It attached all money in the defendant's accounts at the Limbe and Blantyre Commercial Bank branches. The order never referred to the amount claimed. The defendant applied. The Deputy Registrar set aside the ex parte order. He ordered inquiry into damages.

The Deputy Registrar reasoning for setting aside the application is in the following excerpt:

"It is necessary to determine whether or not the defendant is in anticipatory breach of the contract between the parties because it is only then that it can be established whether, or not the plaintiff's action is founded on reasonable grounds. The question that is greatly exercised mind is whether or not there can be anticipatory breach of the terms a contract that has not come into effect, taking into account that the agreement between the parties clearly stipulated that the lease will only take effect as from May 1, 2000. It is my view that a party to a contract can only sue on the terms of such a contract upon the terms of such a contract taking effect. The plaintiff in this case is suing under clause 3.3 of the contract and the contract having not come into effect, the clause is ineffective and therefore cannot be relied on as a basis for an action. In my view, it is only after May 1, 2000, when the contract takes effect that the plaintiff can effectively sue under the clause."

The Deputy Registrar thought the agreement stopped the plaintiff attaching the property. The Deputy Registrar ordered damages under Order 8, rule 4 of the High Court Rules. The plaintiff appeals against the orders setting aside the order ex parte and inquiry into damages.

the factual premise

The defendant is a limited company and the plaintiff's tenant. The ten-year lease expired on 30th April 2000. In November 1999 the parties renewed it for a further five years. A term of that agreement should be reproduced. It supports an argument advanced before me and the Registrar.

"If and whenever any rent shall be in arrears for seven days (whether the same shall have been formerly demanded or not) 5% interest per month (before as well as after judgment) shall be paid or if and whenever default shall be made by the lessor in the performance or observance of any if the stipulations herein on the lessee's part contained or shall suffer a receiving order in bankruptcy to be made against the lessee or compound with the creditors or being a company that goes into liquidation (other than for purposes of amalgamation or reorganisation of the company) the lessor may reenter upon the demised premises or upon any part thereof in the name of the whole and the tenancy shall thereupon determine but without prejudice to any claim which the lessor may have against the lessee in respect of any breach of the lessee's covenant herein contained. *The lessor shall not attach any of the lessee's goods and chattels and more particularly the raw materials, work in progress and finished goods.*"

Several weeks before the writ the defendant's managing director informed the plaintiff the company was closing in Malawi. The plaintiff wrote the company about the new lease agreement. The company never responded. The plaintiff deposes that the company is laying off employees and is moving equipment to South Africa. He has sued the defendant for damages for breach of the lease agreement.

The plaintiff claims US$102,000, the amount of the notice, interest at the lending rate and US$ 15,300 costs. The plaintiff sued on 3rd April 2000.On that day he applied for attachment of property before judgement. On the critical aspect the plaintiff deponed:

"My fear is that once the defendant close down the business completely and transfer all their assets to South Africa, I may have difficulties in enforcing my rights as contained in the Lease Agreement against the defendant."

The affidavit in support of the application for attachment of property before judgement never suggests the company is disposing the property to delay or defeat the plaintiff's claim or judgement.

The Deputy Registrar thought the plaintiff could not sue because the contract had not taken effect. Consequently, the Registrar never considered the other aspects of the application under the rule. On appeals from a registrar's ruling a judge virtually rehears the application.

the statutory scheme and Order 8 of the Rules of the High Court

The appeal is important to lay down the practice and approach on applications under Order 8 of the Rules of the High Court. Counsel referred the Deputy Registrar to a decision of this Court and registrar's ruling in Skipco (Pty) Ltd v Msiyadungu, Civ. Cas. No. 334/1991, unreported. That was a decision of the Chief Justice Makuta on an appeal from a registrar's ruling. The two decisions, although the Registrar's ruling is not binding on this Court, raise many and important aspects of practice and procedure under the rule.

The Registrar in Skipco (Pty) Ltd v Msiyadungu referred to sections 13 and 14 of the Courts Act. The Registrar did that for three reasons. First, to establish the jurisdiction of the Registrar to order attachment and arrest before judgement. The Act gives jurisdiction to the Court. The rules refers to 'Court.' The registrar therefore had jurisdiction. Secondly, the registrar wanted to demonstrate that the

jurisdiction was statutory. More importantly, the registrar wanted to show that the jurisdiction had to comply with the statutory scheme.

The Chief Justice, dismissing the appeal, in relation to the registrar's approach, said:

> "I have gone through the Registrar's Ruling. While I agree that the Registrar dealt with sections 13 and 14 of the Courts Act, that was not the basis of his ruling. The purpose of mentioning those sections was to show that by 1958 we, in Malawi, had some provisions in our law which was not obtaining in English law, both in statutes and common law. These provisions are the arrest of defendant before judgment and attachment of defendant's property before judgment. The mentioning of those was, in my view, superfluous for the purpose of the ruling and was, perhaps, an academic exercise because the application to set aside was made under o.8, r.1 and the Ruling was based on that Order."

Reference to the statute is important to understanding Order 8 of the Rules of the High Court. Order 8 is based on sections 13 and 14 of the Courts Act. Rules of the High Court are made under section 67 of the Courts Act and intended "for the better carrying out of the purposes of this Act." More precisely, Order 8 is intended to carry out better the purposes of sections 13 and 14. The statutory authority of the Rules of the High Court and the Rules of the Supreme Court in England is the same. The latter are made under the Supreme Court Act 1981. Their statutory authority is limited to matters of procedure only. The rules cannot alter substantive law. To the extent that they do they are *ultra vires* and void (Ward v James, [1966] 1 QB 273). The Rules of the High Court, passed after the Courts Act 1958, in many ways carry further and better the scheme of the Act. Order 8 must be understood from sections 13 and 14 of Act.

Section 13 provides:

> "(1) If, in any civil action or suit, the High Court is satisfied by evidence on oath that the plaintiff has a good cause of action and that the defendant, with intent to obstruct, defeat or delay the claim of the plaintiff, is about to leave Malawi or has deposed of or has removed or is about to move his property or any part thereof out of Malawi, the High Court may, upon application made by the plaintiff at any time after the issue of the writ, issue a warrant to bring the defendant before the High Court to show cause why

he should not give security for his appearance to the satisfaction of the High Court.

(2) If the defendant fails to show cause or fails to give such security as may be ordered, the High Court may commit him to custody until the determination of the action or suit or execution of the judgment, provided that it may release him at any time on such terms as it may think just."

Section 14 provides:

"(1) If, in any civil action or suit, the High Court is satisfied by evidence on oath that the plaintiff has a good cause of action and that the defendant, with intent to obstruct, defeat or delay the execution of any judgment that may be given against him, has disposed or is about to dispose of his property or any part thereof or has removed or concealed or made away with or handed over to others any of his property, the High Court may, upon application made by the plaintiff at any time after the issue of the writ, order the defendant to furnish security for such amount, not exceeding the claim and costs in the action or suit, as to the High Court may seem fit, or in default may direct that any property of the defendant be attached until further order."

"(2) No attachment under this section shall prejudice the claims of any person not a party to the suit."

"(3) The High Court may at any time order the attachment to be withdrawn."

The scheme is the same in both sections. The Court should not under section 13 commit a defendant to prison upon arrest unless the defendant fails to show cause or give security for the defendant's claim. Equally under section 14, attachment of property follows, after the court so ordering, the defendant defaults furnish security for the plaintiff's claim. Between the two there are practical problems the sections inadequately provide for.

The Committal before judgement section is a little more comprehensive than the attachment before judgement provision. Committal to prison till trial or judgement is possible if one fails to show cause why she should give security for

appearance. It appears that the Court could commit if cause is not shown even if the defendant can furnish security. The court would be very reluctant to use its discretion that way. The Court could order the defendant arrested under the section to furnish security. If she fails there and then the court could commit. Having ordered security upon arrest the court, rather than commit, could allow time for payment. The court would then commit only after the defendant failed to furnish security. Problems could arise when the defendant has been released to fetch security. It would be risky to release the person to fetch security. There the option is to commit as soon as possible. It may be useful then just to attach property rather than commit him. There will be situations where it is just to commit rather than attach property.

Attachment of property before judgement however raises a few practical problems. Under the section the Court could order security. If the defendant cannot furnish security, the court could consider that as default and order attachment immediately. Problems could arise where time is allowed to furnish security. There are therefore inherent weaknesses in the statutory scheme.

More perplexing is the distinction the two sections make. Section 13 refers to the defendant intending to defeat the plaintiff's "claim." Section 14 refers to an intention to defeat the "execution of a judgement that may be given against him."The expressions cannot refer to the same thing. The sections actually prescribe different remedies for each. It seems to me that if the defendant only intends defeating the plaintiff's claim the plaintiff should apply for arrest for the defendant to show cause why she should not offer security for the plaintiff's claim. If she fails to show cause the court will order security for the plaintiff's claim. The court may order committal till the matter is concluded if the defendant fails to give security for the plaintiff's claim. There is no suggestion that the court could, once the arrested person is before it, could order attachment of property if the defendant cannot proffer security. Section 14 however gives the court power to attach property if a defendant wants to defeat, delay or obstruct execution of a judgement that may be given against. It follows a fortiori that attachment can only be ordered if the intention is to thwart execution of a judgement. The power to attach property before judgement would not enure to a man who is only trying to avoid the plaintiff's claim.

The logical is to look at the committal and attachment of property before judgement powers as effective in combination. It is difficult to define the word 'claim' in a manner excluding the right up to judgement. Equally, one cannot logically draw a line where an intention to defeat the execution of a judgement

begins. It is absurd to hold that one who only intends to defeat a claim does not also intend defeating execution of a judgement that may be given against her. The difficulties are overcome by Order 8 of the Rules of the High Court. The rule refers to a claim for exercise of both powers.

Order 8 puts together the scheme of the two sections in a way that gives a wide and purposeful exercise of the Courts discretion. Order 8, rule 1(1) provides:

> "If the Court, after issue of a Writ, is satisfied that a plaintiff has a good cause of action and that the defendant, with intent to defeat or delay the claim of the plaintiff, has absconded or left Malawi, or is about to do so, or has disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so, or has wilfully evaded or attempted to evade service of the process of the Court upon him, the Court may-
>
> (a) order his arrest on a warrant and require him to furnish security, in the manner set out in Order VII rule 3 (2) for his appearance and, in default, commit him to prison, or
>
> (b) order that attachment issue against the defendant's property, in all respects as if he were a judgment debtor, save and except that any property seized shall not be sold prior to judgment, unless subject to rapid decay or deterioration, or by leave of the court."

Admittedly the statutory requirements that committal or attachment should only be after failure to show cause why security should not be ordered or default in furnishing security is conspicuously absent. The suggestion that this means that the court should not consider the statutory requirements is not supported by the authority of the rules in relation to substantive law, the Courts Act. The Chief Justice in Skipco (Pty) Ltd v Msiyadungu said:

> "In view of the foregoing, I am of the view that a plaintiff who resorts to O.8, r.1(1) (b) of the Rule of the High Court may obtain an order of attachment without the requirement of security and default. The intention of O.8, r.1(1) (b) is, in my view, to protect a plaintiff whose property or the property he is claiming, is in control of a defendant and the property is in

danger of being concealed, dissipated or being destroyed. Should final judgment in such action be in favour of the plaintiff, it is rendered nugatory since the property will not be available."

Order 8 does not refer to furnishing of security. It is true, as I have stated and the Chief Justice alluded, that the statutory scheme would thwart the noble purposes of the Rules. It would be giving so much ascendancy to the Rules of the High Court to suggest that Order 8 meant to ignore the statute. In my judgement Order 8 gives an accommodating flexibility and flagellation to the statutory provision that furthers the purposes of the sections. In my judgement the court has a wide discretion given the situation that sections 13 and 14 of the Act and order 8 of the Rules of the High Court want to address. The court could order on the circumstances of a case that attachment of property or arrest before judgement be only if the defendant fails to show cause for why he should not furnish security for his appearance or fails or defaults to furnish security if ordered by the court. The Court, as the Chief Justice observed, could order committal or arrest notwithstanding that there has not been any default or failure to furnish security. The circumstances where this is condign are those that the Chief Justice, approving the registrar's statement, states:

"It will be appreciated that if property being claimed is in danger of dissipated, concealed or being destroyed, some quick action needs to be taken to protect it and that may necessitate the making of an ex parte application. I am the opinion that that is why there is a requirement that an application for an order under O.8, r.1 shall be made by summons in Chambers supported by affidavit: see O.8, r. 2. This is actually what happened in this case. I see no basis for the argument that where there is mention of an application by summons, such application should only be inter partes. In a matter of urgency or in appropriate circumstances the court has inherent powers to make an ex parte order even if it affects other parties. Such other parties can, of course, apply to have the order set aside if they can show good grounds."

This allows laying practice directions on applications for attachment and committal before judgement.

the procedure to follow

First, a judge or registrar has jurisdiction. In the Act the 'Court' has jurisdiction. Therefore the power can only be exercised by a judge in open court, not in chambers (Baker v Oakes, (1877) 2 QB 171, Re Davison, (1899) 2 QB 103). In the rules of court, 'court' includes a Registrar in Chambers(Firman v Ellis, (1978) QB 103). Where, like here, the application includes an injunctive relief, unless parties consent to the Registrar granting the injunctive relief, it is prudent that a judge hear the whole application. This avoids the parties appearing before the judge and registrar for the two reliefs. Paragraph 2 of the ex parte application seeks an injunction. That the Registrar could not grant.

Secondly, the application can be made *ex parte* on a summons. *Ex parte* orders are justified because stealth and speed may be the only way to meet the ends of justice envisaged by the procedure.If the man is about to abscond or is disposing of his property notice of the process may only further better his schemes. A person arrested on an ex parte order should be brought to the court or the nearest court mentioned in the order as soon as possible If the application is *ex parte*, the attachment order should be for a very short time to enable a hearing inter partes. At the least, the inter partes hearing should be heard within two days and at the most the next nearest motion day. This will reduce the damage to both parties should it transpire at the inter partes hearing that the order should not have been made in the first place. It also enables the defendant to quickly furnish security for the plaintiff's action. The defendant retains his right to set aside the order obtained without him in the first place. The Court could still make the order to up to trial depending on the circumstances, take for example where the defendant has absconded or is evading service. There an *inter partes* hearing may be impossible. The applicant must demonstrate urgency and expediency in the affidavit in support of the ex parte application.

Thirdly, an *ex parte* order should indicate on the face of it that the arrest of the debtor or attachment of property before judgement will be discharged if the defendant furnishes security for the amount claimed.

Fourthly, at the *inter partes* hearing the court, before ordering committal or attachment of property, should consider whether the defendant can furnish security. If the defendant can provide security for the claim it is an improper exercise of the discretion to commit to prison or attach property before judgement. There are bound to be cases where immediate committal or attachment of property before judgement is the right thing.

Fifthly, the application for attachment of property should be for the amount of the defendant's claim. This is obvious from the wording of the sections and Order 8 of the Rules of the High Court. Where the amount cannot be ascertained, as where damages have to be assessed, it will be very important to assist the court to make an appropriate order. Obviously, an order, as the one in this matter, attaching nearly all the defendant's property without regarding the amount claimed should be the most unusual and exceptional as to be avoided all together. The duty is on both counsel to assist the court and their clients in the interest of justice.

Finally, it may be necessary that the plaintiff make an undertaking to compensate the defendant for any injury to his property, credit or reputation should the action be hollow. This undertaking introduces balance. The order is made before rights of the parties are finally determined. While a case may be good on affidavits, it may disintegrate at a trial. The undertaking becomes a necessary deterrence against overenthusiastic and conceited clients. Also it gives the defendant a strong base on which the defendant can fall on should the action or application be unwarranted.

the court is not at this stage deciding the matter finally

The gist of this appeal is that the deputy Registrar should not have dissolved the ex parte order of attachment of property before judgment of 3rd April, 2000. The Deputy Registrar thought the plaintiff could not sue for breach of a contract that had not taken effect. He also thought the plaintiff could not attach the defendant's property. It appears that the Deputy Registrar proceeded that way because of the way counsel argued the matter. Mr Tembenu, for the plaintiff, and Mr Msowoya, for the respondent, argued the matter in the same way before me. When considering whether to attach property or commit a defendant before judgment, a court is not deciding the matter finally. The court at this stage is not concerned with the merits of the plaintiff's case. That can only be determined at the trial. The court is only concerned that the defendant's conduct may prejudice the outcome of the trial. The Deputy Registrar approached the matter as if he was deciding the matter finally. This he should not have done. I should therefore approach the matter by way of rehearing and decide whether the defendant's property should be attached before judgment.

the matters to consider

The way forward is to consider the statutory provision and Order 8 of the Rules of the High Court. To obtain the order the plaintiff must satisfy the Court on four issues. The plaintiff must show that there is an action in some court, satisfy the High Court on oath that she has a good cause of action, satisfies the High Court on oath that the defendant intends to delay or defeat her claim or judgment, and establish some or prospective property disposition or evasive conduct. The first aspect is unlikely to cause problems. It should only attract one comment: the action could be in any court; it does not necessarily have to be in the High Court. It is the second aspect that was not property canvassed before me and the Deputy Registrar by counsel.

The plaintiff has to show that she has a good case or cause of action. She only has to satisfy the High Court on oath that he has a good cause of action. In my judgment, that must be a case with some chance, not real chance, of success. I do not think it means a case raising an issue to be tried. This suffices for an interlocutory injunction. Committal or attachment of property before judgment is a serious matter. In the one case it involves violation of freedom of movement. In another it is interference with property rights. In either case the decision is taken before the rights of the parties are determined. The court should avoid determining the case on the merits on affidavits, affidavits meant to satisfy the court exercising a discretion to avert injustice should the plaintiff succeed. The plaintiff has not succeeded yet. Equally, where serious legal issues that only argument at a trial can properly resolve exist, the court should avoid them at this stage. In an appropriate case, however, the court, in clear case, resolving those at that stage may be the just thing. A stitch in time saves nine, they say.

The court must in deciding whether the plaintiff has a good case evaluate the chance of the plaintiff succeeding in that action. The court must order attachment or committal if the plaintiff's chances are more than favourable. Evaluating a chance involves forming a tentative view of the relative strength of the parties' cases. The court must order attachment or committal if the plaintiff's chances are more than favourable. If the chances are even, the court must exercise its discretion having regard to the conduct and intention of the defendant in the action that caused the application in the first place. I think, where the chances are even, a defendant, animated to defeat or delay a plaintiff's claim, cannot complain if a court rallies behind a plaintiff desperate for justice. Conversely, the court should not order committal or attachment if the defendant's chances are more than

fovourable. There is a penumbra of injustice in saddling a defendant with an attachment of property for a case that a plaintiff has a faint hope of succeeding.

The plaintiff must establish a disposition by the defendant or indication that the defendant undermines the plaintiff's right to redress. Disposing, removing, concealing, making away or handing over of property to others are instances dispositions. Equally, absconding or attempt to abscond and evasion or attempt to evade court processes are conduct undermining the plaintiff's right to redress.

Finally the plaintiff must satisfy the High Court on oath that the defendant by the actions and conduct mentioned intends to defeat or delay the plaintiff's claim. All disposition of property involves prejudice to a plaintiff who has a claim. The legislature could not have intended that a plaintiff's claim and right to redress stops the defendant from disposing his property. Equally, not all absconding is caught by the powers envisaged in sections 13 and 14 of the Courts Act and Order 8 of the Rules of the High Court. The difficulty is to isolate culpable action and disposition from the innocuous. The plaintiff must satisfy the High Court on oath that the disposition of property or conduct is intended to defeat or delay the plaintiff's claim. The intention must be established like all other intentions, that is from words or conduct from which such an intention can be inferred. All turns out on the evidence and facts in a particular case. The evidence must be such that it can be said that the defendant's action and conduct are intended to defeat or delay the plaintiff's claim. That is hardly, if at all, achieved just by evidence of disposition of property or abstention.

application of the principles

Now let us apply these principles to the application here. At the time of the application there was an action in the High Court. The Act and Order 8 of the Rules of the High Court require that the application be made after the writ has been issued. One crucial point to consider is whether the plaintiff had in his affidavit satisfied the court that he had a good case.

The plaintiff does not have to establish a case that will succeed. The court has to avoid determining the matter finally. Here the defendant, through its managing director, informed the plaintiff the company was closing business. The Deputy Registrar considered the law on anticipatory breach. Without this Court at this juncture considering what that meant, first, the Deputy Registrar decided that the plaintiff could not take the action before the lease took effect. The Deputy Registrar conceded there was anticipatory breach. He held however, that the

action could only be heard after the lease took effect, that is on the 1st May 2000. Mr Tembenu, appearing for the plaintiff, is right. If there is anticipatory breach, the plaintiff is entitled to sue immediately without having to wait for the time when the contract is to take effect. I also accept Mr Tembenu's rhetoric that it cannot be anticipatory breach that that has to occur when the time of performance arrives.

Anticipatory breach occurs, in my judgement, when before the time arrives when a party is bound to perform the contract, she expresses an intention to break it or acts in a way as to lead a reasonable man to conclude that a party never intends to fulfil his part (Universal Cargo Carriers v Citati, [1957] 2 QB 401, affirmed in part in[1957]1 WLR 979). The innocent party has two options. He can accept the renunciation. He must notify the other party of the decision. If he does not accept the repudiation, so to speak, by notifying the other of his decision, the contract continues. In Howard v Pickford Tool Co, [1951] 1 KB 417, 421, Asquith, L.J., said:

> "An unaccepted repudiation is a thing written in water and of no value to anybody: it confers no legal rights of any sort or kind. Therefore a declaration that the defendants had repudiated their contract with the plaintiff would be entirely valueless to the plaintiff if it appeared at the same time, as it must appear in this case, that it was not accepted."

If the innocent party accepts the repudiation he is discharged from the contract and can sue forthwith. The innocent party can as well wait for the time for performance to arrive and then sue. In Johnstone v Milling, (1886) 16 QBD 460, 470, Cotton, LJ , said:

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enable the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it ..."

All is in the innocent party's election. The Deputy Registrar would have decided differently if these cases were cited to him. I assume they were not. When there

is anticipatory breach, as that term is understood in law, the innocent party does not have to wait for the time of performance to arrive.

Mr Msowoya, appearing for the defendant, contends however that there could not be anticipatory breach of a lease. He relies on the decision of the Court of Appeal in Total Oil Great Britain Ltd v Thomson Garages (Biggnihill) Ltd, [1971] 3 All ER 1226. In that case Lord Denning said:

> "The second point is what is the effect of the repudiation by the oil company which was accepted by the dealer? Does it put an end to the lease? I think not. A lease is a demise. It conveys an interest in land. It does not come to an end like an ordinary contract on repudiation and acceptance. There is no authority on the point, but there is one case which points that way. It is *Leighton's Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd.* Lord Russell of Killowen and Lord Goddard were both of opinion that frustration does not bring a lease to an end. Nor, I think, does repudiation and acceptance."

While repudiation and acceptance do not put an end to a lease, Lord Denning did say that the parties have some rights. He said later that the innocent party "could go to the court and get an order for specific performance... of this agreement... He could, no doubt claim damages, to, if he suffered any. But the lease did not come to an end." Consequently, though the lease had not come to an end the defendant had rights to enforce. He could sue for specific performance. He opted for damages.

There is a sense in which what Lord Denning said could be said to be of general application. One must not lose a site of the fact that at this stage the court is not trying to finally determine the rights of the parties. While the court may have to assess the relative strengths of the parties' cases the court in deciding whether there should be attachment of property before judgment is only concerned with whether the plaintiff has established a good case for the court to exercise the discretion in his favour. From what I have just quoted from the words of Lord Denning, notwithstanding that the lease has not come to an end, the plaintiff can, though he has not done so, sue for specific performance or damages, as he has done. The plaintiff therefore had a good case for purposes of the application, assuming there was anticipatory breach. Assuming there was evidence on which the court could conclude there was anticipatory breach in this case the court was

to grapple with the factual complexion and legal analysis envisaged by Mr Msowoya. This is impermissible at this stage.

To establish anticipatory breach requires a factual premise. Anticipatory breach can be, as is alleged here, by renunciation. Renunciation can be by word or conduct. The exact words used must be such that they indicate to a reasonable man that a party does not intend to fulfill his part of the bargain. The exact words used by the defendant are that the company is closing business. In my judgment, without a trial, where through examination-in-chief and cross-examination, it is difficult to suppose that the words mean that the defendant is not going to abide by the lease agreement. The Deputy Registrar, urged by counsel, was drawn into deciding that. That was unnecessary for purposes of the application. There is reference to conduct whose effect is to renounce the agreement.

The words actually used by the defendant, without more, would not imply that the company was not willing to continue with the lease. The defendant company was in clothing business. The lease could be used for purposes other than clothing. As Mr Msowoya points out, the lease allows the defendant, with the consent of the landlord, to sublet. More importantly, the words would be unintelligible in relation to a company. Would they mean a voluntary, creditors or a compulsory winding up? Whatever the case, they would purport, a decision or petition to that effect to wind up a company. These are considerations a trial would resolve but need not be resolved at this stage. They are considered at this stage to assess the relative strength of the parties' cases before exercising the discretion to grant an attachment of property before judgment. The uncertainty would hold the cases for either party on balance. A similar result would follow if instead of the words used one considered the conduct of the defendant.

The plaintiff relies on the conduct of the defendant to show that the defendant does not intend to do his part of the bargain. The plaintiff relies on the defendant's silence in responding to his request to the defendant to clarify the position on the lease in view of the defendant closing business. I entertain the same reservations as Mr Msowoya. Mr Msowoya relied on Ripley v M'Clure, 4 EX 345. The Court there held that the defendant was not bound before the arrival of the cargo to give the plaintiff a distinct answer whether he would fulfil the contract or not. Equally, the defendant was under no duty to inform the plaintiff on the status of the lease that had to take effect in the future.

The Deputy Registrar also held that the plaintiff was precluded from suing because of a clause in the agreement. Mr Msowoya argues that the understanding

that limiting clauses are inapplicable where there has been fundamental breach of the contract is a thing of the past. He submits, correctly in my view, that courts now respect freedom of contracts. I would add that a different view would only mean that courts ignore business sense. There are certain ventures where such limitation does not only make sense but is necessary. Mr Msowoya relies on a decision of the House of Lords in Photo Production Ltd v Securicor, [1980] 1 All ER 556. He has cited the words of Lord Diplock who read the judgement of the House where Lord Justices Wilberforce, Salmon Keith and Scarman sat. At page 566, Lord Diplock said:

> "In the interests of clarity the expression should, in my view, be confined to liability for tort. A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinitive; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. Butt if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are full at liberty to do so by express words."

At page 567 Lord Diplock said:

> "Parties are free to agree to whatever exclusion or modification of all three types of obligations they please within the limits that the agreement must retain the legal characteristics `of a contract` and must not offend against the equitable rule against penalties, that is to say, it must not impose on the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties by entering into the contract intended to accept the implied obligations, exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend on the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as

obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a peculiar kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only."

I t is obvious from the words of Lord Diplok relied on by counsel that all depends on the clauses in the contract. On close reading of the contract, my preliminary view would be that the limitation only applied to breach of covenants of the lease. I do not think it applied to where the parties are in breach of the lease agreement itself. That matter, however, can be resolved by trial after hearing argument from counsel. I do not think that the Deputy Registrar's conclusion that the contract precluded attachment of property before judgement was right.

The plaintiff must show some disposition of property. If not the plaintiff must show, not shown in this case, that the defendant is about to or has absconded or is keeping away from being served with court processes. The company cannot abscond. Even if it could, one who absconds does not, as happened here, inform the person he is keeping away from. The company in principle cannot evade service. The company was in fact served with court processes. The only matter for consideration is whether the defendant was disposing of property. Certainly that does not comprise in laying down of employees. Employees cannot be understood as property for purposes of the application. The plaintiff deposes that there is movement of equipment to South Africa. That suffices as a disposition.

The plaintiff must satisfy the Court on oaths that the disposition means to defeat or delay the plaintiff's claim. I have read the plaintiff's affidavits repeatedly. It never suggests the defendant intends to defeat or delay the plaintiff's claim. The important paragraph suggests the plaintiff wants security for judgement. If anything the affidavits suggest that the removal is because the defendants are moving business to South Africa. More precisely the disposal is for winding up or closing business. While that may defeat the plaintiff's claim, it is another thing to suggest that the intention of disposing the property is to defeat the plaintiff's claim. To hold that would mean that a person, who for good reason wants to close business, cannot do so if others have claims against her. This does not mean that a man closing business cannot intend to defeat or delay a plaintiff's

claim. It means that where a person closes business, it does not follow that he intends to defeat or delay the plaintiff's claim. The plaintiff must show that the defendant closing business aims to defeat the plaintiff's claim. It would not be right in my judgement to hold that each time a man closes his business he intends to defeat claims others may have against her.

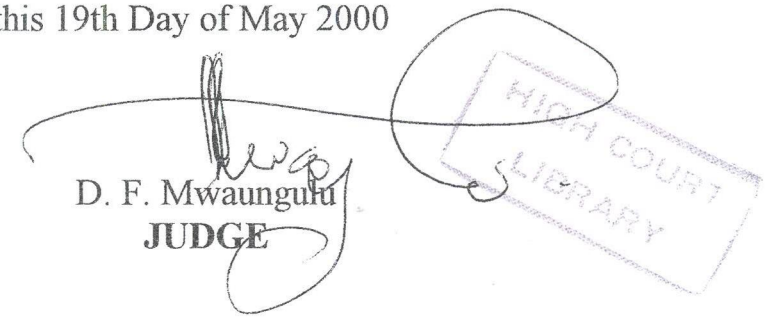
On the events as occurred, it is difficult for me to think that the defendant intended to defeat the plaintiff's claim. If the defendant intended to defeat or delay the claim, the defendant would not, in my judgement, have informed him they were closing business in the first place. If the defendant intended that the last thing she would do is informing the plaintiff of what was pending. I would think that the defendant informed him so that he could make the claim as the defendant was closing business. The defendant informed the plaintiff well before, it appears, the defendant, in line with closing business, if there were such plans, started removing goods, if at all. The defendant's actions, to my mind, are not of one intending defeating the plaintiff's claim.

Neither be it supposed that by leaving Malawi *per se* a party intends to defeat or delay another's claim. A man who leaves a country for another country, whether be of origin or not, is not, by the act of leaving alone, absconding. The exigencies and vicissitudes of life may necessitate moving quite apart from intending to abscond or defeat or delay another's claim. Obviously, if it be demonstrated that the departure is with intent to abscond or defeat or delay the plaintiff's claim, sections 13 and 14 of the Courts Act and Order 8 of the Rules of the High Court apply.

It must always be remembered that under Order 11 of the Rules of the Supreme Court, retained under the new Civil Procedure Rules, Rules which are part of our practice, if a contract, as here, was made here and relates, as here, to land situate in Malawi, action can be commenced here against any person outside the jurisdiction subject of course to that reciprocal enforcement of judgements arrangements exist. Where there are no reciprocal enforcement of judgements arrangements, bilateral or under international conventions and treaties, the High Court should consider that in deciding whether the defendant's actions mean to delay or defeat another's claim. There are reciprocal arrangements for enforcement of judgements between Malawi and South Africa. Unless, therefore there is a real intention to defeat and delay the plaintiff's claim, attachment should be ordered circumspectively.

I am not satisfied on rehearing the matter that the plaintiff has established that the defendant's acts of disposal are intended to defeat the plaintiff's claim. Order 8 empowers this court to award damages in the circumstances of this case. The defendant when applying for the order to set aside the ex parte order also applied for damages if the order of attachment was proved to have been wrongly granted. I do not know of any principle on which the defendant cannot do what he did here. The Registrar was right to consider the matter of damages. I would dismiss the plaintiff's appeal with costs.

Made in Chambers this 19th Day of May 2000



D. F. Mwaungulu
JUDGE