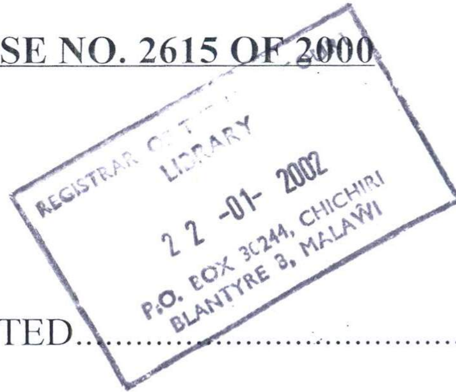
IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2615 OF 2000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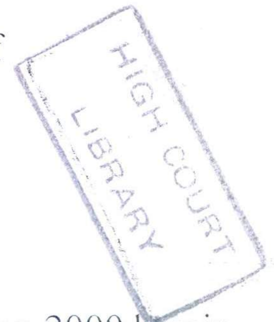
BETWEEN:

KATUNDU HAULAGE LIMITED..PLAINTIFF

and

ATTORNEY GENERAL..DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**
Mr Bazuka Mhango, of Counsel for the Plaintiff
Mr A. Chinula, of Counsel for the Defendant
Mr Selemani, Official Interpreter


HIGH COURT
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RULING

There is an interlocutory judgment dated 19th September, 2000 herein. It was entered in default of service of defence by the defendant. It adjudges the defendant to pay to the plaintiff damages and costs.

The background to the matter is that on 13th September, 1998 around 4.00 a.m. the plaintiff's tanker and trailer registered No's TO 2800 and BG 3934 was involved in a fatal road accident. This was on Kalungama bridge on the Salima - Balaka road where the defendant's agents/servants were carrying out certain engineering works. They omitted to put up an alerting sign to traffic to use a diversion. When the tanker and trailer crushed its driver died on the spot and the vehicle sustained both reparable and irreparable damage. The tanks could be repaired but the horse and the trailer were beyond economic repair.

On 1st November, 2000 the Registrar for good reasons heard the plaintiff on assessment of damages in the absence of the defendant. The plaintiff proferred one witness only in the person of Sylvester Benedicto Mpila, its Financial Controller. Consequent upon this the Registrar subsequently delivered a ruling awarding the plaintiff K7,658,129.20 under various heads. The defendant presently appeals against this award, mainly on the basis that it is not supported by evidence.

A number of preliminary points arose at the hearing of this appeal. First it transpired that the defendant had appealed outside the seven day limit allowed by the rules. It came to light that the defendant only became aware of the Registrar's award some six days or so after delivery of the ruling. By consent of the parties, since the defendant was not so seriously out of time, I ordered that we proceed with the appeal.

Next the parties agreed on an amendment to the plaintiff's statement of claim. Through this consesus the amendment went through.

There then came a demand by the plaintiff to lead evidence in the appeal. It was argued that since under Order 58, and in particular Note 58/1/2 of the Rules of Supreme Court, appeals from the Registrar come to a judge in Chambers by way of rehearing I ought to take live testimony in this appeal. The defendant objected to this. My ruling was that in my understanding the expression "rehearing" did not mean calling witnesses all over again and hearing them. I felt that in this instance the expression "rehearing" meant treating the evidence earlier presented before the Registrar as if it was before me at first instance and deciding on it as freely as I saw fit whether or not I ended up agreeing or disagreeing with the Registrar's reasoning.

Next after this I was given the impression that the parties had discussed and apparently agreed that the plaintiff put in a further affidavit containing what the plaintiff called certain essential facts to assist the court in the final assessment of an appropriate award in this case. There was no specification what these essential facts were. Counsel for the defendant did confirm some discussion on the proposed further affidavit. He was however not quite sure

about the effect of that affidavit *vis-a-vis* the ruling I made on the expression "rehearing" but he indicated that he did not want to stand in the way of the plaintiff's case.

An adjournment of the matter was at this stage sought, as Counsel for the defendant had to rush back to Lilongwe on Parliament business. In my ruling on the application I made it clear that normally an appeal proceeds on evidence taken in the court of first instance. An appeal, I said, should not be used as an opportunity for improving on what was omitted at first hearing. I did however acknowledge that rules allow in rare cases for the presentation of additional or further evidence on appeal. I thus said if the parties were agreed on this further or additional evidence it should be understood that it was being admitted at their instance and not at my invitation. To be fair I directed that the plaintiff serve its intended affidavit quickly enough on the defendant to enable the latter to respond to same, if need be.

When the said further affidavit was filed and served it because obvious that I was quite mistaken in understanding the parties to be agreed on the introduction of this further or additional evidence. From the affidavit in opposition filed by the defendant and from the arguments that preceeded the hearing of the appeal, hereafter, it struck me that in the consesus the parties appeared to have reached, the defendant was not aware of the extent to which the plaintiff intended to go with "essential facts" in the proposed affidavit. To be quite frank the further affidavit which is sworn by the plaintiff's Managing Director and Chairman amounts to a PWII in the case and it attempts to cure the defects and omissions made at the initial hearing. Through this further affidavit, testimony which Mr Mpila failed to give has been brought up and documents Mr Mpila did not produce or tender have now been exhibited.

I am convinced that what I saw as a consesus was not real. I further do not see any other special reason to justify use of this additional evidence at this stage when there is no explanation why it was initially left out in the proceedings before the Registrar. Since the only reason that led me to accept admission of this further affidavit on the plaintiff's part was this "consesus" I cannot after the crumbling of this base now fairly utilize this affidavit in this appeal. It in reality amounts to a second bite on the cake by the plaintiff in

the presentation of its case. One has to bear in mind that the plaintiff had all the liberty to present whatever evidence stood in its favour at the initial hearing at which the defendant was not even present. The plaintiff however opted, without any external pressure, to call only one witness and to only tender the documents it then tendered. For the plaintiff to now use an appeal by the defendant as opportunity to supply for earlier defects is, at the very least, quite unfair and in my view an abuse of the process. I will accordingly strictly deal with this appeal in traditional fashion. I will confine myself to a revaluation of the evidence that was before the Registrar and proceed to decide whether to retain or overturn the decision of the Registrar on that basis alone. To evaluate the Registrar's ruling as against evidence that was not presented to him cannot strictly be appeal business. I thus fully reject the further affidavit and all its new evidence from consideration as I am convinced that it was brought in as an afterthought and merely to improve the plaintiff's case after noting that the earlier presentation was wanting in certain respects.

The Appellant concedes the occurrence of this accident, and that the driver died as well as that the horse and trailer were damaged beyond economic repair and that the tanks were also damaged but that they could be repaired. The Appellant thus further concedes that the plaintiff faced funeral expenses, that it is entitled to replacement of the damaged horse and trailer, and that it is also entitled to repair costs of the damaged tankers, apart from loss of use of the vehicle in question.

In this appeal the major query the defendant has raised to attack the Registrar's award is that it is mainly based on petty cash vouchers, invoices, and quotations, and that there is not a single receipt exhibited to confirm the expenditures claimed. As regards loss of earnings arising from loss of use of the vehicle, the main objection is that the plaintiff worked out these details itself instead of, say, using auditors and that it omitted such essential details as tax. The Appellant made it plain that it was not disputing the expenses or the ability of the plaintiff's to calculate their loss of earnings, but that its concern was lack of concrete proof of expenditure.

It was argued on behalf of the plaintiff/respondent that a petty cash system of accounting was as good a system as a receipts one and that in this

case use of invoices and quotations was equally effective in the demonstration of the incurring of obligations and liability to pay.

To cut a long story short, let me say here that the defendant/appellant raised a strong point here. A receipt is a far more powerful piece of evidence in my view than any petty cash voucher, invoice or quotation. A receipt more than any of these other documents of accounting tells more clearly that an incurred obligation has been met with a payment duly acknowledged by the provider of a service. Thus on any day a receipt that a coffin, or fuel, or gas has been paid for or that a truck has been hired is for better than a petty cash voucher indicating that so much money has been put aside for this or that service. As regards quotations it is possible to get such from several sources and for some of them to be higher and for others to be lower. Thus the mere exhibition of a quotation need not be taken as proof of the incurring of an obligation as one may easily opt for a different or cheaper quotation. I thus cannot agree that a petty cash voucher, an invoice, or a quotation can stand on the same footing as a receipt.

Be this as it may, before I can consider whether to fault the Registrar in this respect I have to bear in mind the true situation in which the Registrar found himself. He had before him an interlocutory judgment which had been entered in default of service of defence. He also had before him only the plaintiff on assessment of damages despite service of notice of appointment on the defendant. He had oral testimony of a witness to back up the petty cash vouchers, invoices, and quotations that were being tendered before him. There was no challenge or dispute being raised against all this evidence and he enjoyed the advantage of assessing the demeanour of the witness that was testifying before him. In the circumstances, the combination of this oral and documentary evidence, which stood uncontroverted, gave the Registrar as nearly clear a picture as he could get as regards the plaintiff's losses and recovery entitlements as was possible.

True receipts, important as they are, were not tendered in evidence, but as I have indicated the Registrar was not just blindly falling for the petty cash vouchers, invoices, and quotations. He was considering these after taking into account the oral testimony on oath of the plaintiff's Financial Controller

who tendered them. Short of dreaming up his own figures I think the Registrar was quite entitled to view the evidence before him in the way he did and to make the awards he made.

I have myself gone through the evidence of Mr Mpila alongside the documents he tendered. I have also borne in mind that the Appellant is not in fact questioning any of the expenditures covered on the petty cash vouchers. I particularly note that the reasonableness of the figures being claimed has not fallen into question. The expenditures attached to recovery costs of the damaged vehicle, funeral expenses, hiring costs for transportation of the remains of the driver to Karonga, and related staff allowances do not appear to be out of proportion. I have seriously asked myself whether the mere absence of receipts when there is instead testimony of Mr Mpila and petty cash vouchers and when it is clear that the accident herein must have entailed this type of expenditure, should really make the award of the Registrar faulty under this head. I take the view in the circumstances that the Registrar was quite right in making the awards he made despite absence of receipts in these areas.

As regards the quotations on cost of replacement of horse and trailer while I stand by my remarks that quotations can come from any source and can vary depending on the source, I am comforted in this regard that the Registrar had to consider these quotations in the light of testimony by a Financial Controller of the plaintiff, whom he had opportunity to assess. The plaintiff's horse and trailer having been damaged beyond economic repair in the accident I have no doubt in my mind that the plaintiff was/is entitled to their replacement. To require that the plaintiff buy the replacements first and then display receipts for recovery from the defendant would on my part appear somewhat unduly oppressive on a party already weakened by the tort of the defendant. I fully subscribe to the Malawi Supreme Court decision in MSCA Civ. Appeal No. 48 of 1995 **Fernandes -vs- Karfreight Deliveries Ltd** that the plaintiff is entitled to *restitutio in integrum* in this regard. I have however to evaluate the Registrar's award here in the light of the evidence presented to him. I think the quotations presented to the Registrar coupled with the buttressing testimony of Mr Mpila, the said evidence having stood unchallenged, gave the Registrar a sound base for the award he made. I really cannot fault his ruling just because there was no receipt shown to him

for purchase of a replacement horse or trailer. In making his award the Registrar does not appear to me to have employed any wrong principle of law or on the evidence before him to have made any award that may be described as extreme in any way. I will therefore not interfere with the award he made under this head.

On repairs to the tanks my reasoning is the same. If the Registrar had relied on naked quotations from Pew Limited I would have had cause to worry about the award. He however also took in evidence buttressing testimony from the Financial Controller. The obligation of the defendant to foot the repair costs of the tankers damaged on the plaintiff's vehicle as a result of the accident is not in doubt at all. The evidence before the Registrar went beyond a mere quotation from Pew Limited. It extended to the fact that the tanks were taken there and repaired at the quoted price and it stood unchallenged. I think in the circumstances it would be idle to disallow the award simply because the Registrar was not shown any receipt relating to the repair costs.

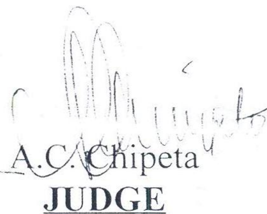
On loss of earnings due to loss of use of the vehicle in question the main complaint I picked in the appeal was that the plaintiff rather than someone independent did the calculations. In the absence of authority barring a complainant from doing his/her own computation of loss of profits in a like scenario I find myself reluctant to just rush and accept that as a fault. I do bear in mind that it was acknowledged that the plaintiff was well placed to make the calculations it made.

One other complaint raised on appeal under this head is that in the computation of loss of earnings the tax factor was omitted. I think this is quite a fundamental point. Exhibit P5 indeed entirely omits that factor in its computation of the profits the plaintiff might have made through use of this vehicle had it not been involved in the accident. I think there is no escaping the point that if all had been well and profits had indeed been made as estimated, the same would have been subject to the ruling rate of tax for a business organization. Liability to tax cannot be thrown overboard just because we are dealing with estimated loss of use and loss of profits. Leaving this aside however exhibit P5 appears to be a genuine effort at projecting a true picture of what the going concern of the plaintiff would have

yielded over the time covered had it not been for the interruption of the accident. It appears to me to properly balance revenue as against operating costs and brings forth a balanced picture. Again here I bear in mind that the Registrar had both the testimony of the Financial Controller and exhibit P5 to go by, which at the time stood unchallenged before he made the award. Save for the tax factor which was not then raised I think the Registrar correctly arrived at the award he made as regards loss of profit. Subject to a direction that the awarded loss of earnings be subject to tax at the ruling rate for a business organization for the period of 14th September, 1998 to 14th October, 2000 I confirm the award the Registrar made.

I have in this case tried as much as possible to place myself in the shoes of the Registrar when he heard evidence on assessment. The essence of an appeal being essentially to correct errors the lower court may have made on the material presented before it I have confined myself to a revaluation of that evidence which was uncontested at the time and tried to assess whether the Registrar engaged in any faulty reasoning in reaching the awards he made. I have duly failed to find such fault and I have refused to test the Registrar's awards against evidence that was not presented to him through no fault of his. All in all I have held that all the awards made by the Registrar stand save for taking into the tax factor on the award of K3,019,695.00 as regards loss of use of the vehicle. Thus subject to this authorized deduction, the award in favour of the plaintiff as made by the Registrar is confirmed in full. The appeal of the defendant thus fails and is dismissed with costs.

Made in Chambers this 8th day of February, 2001 at Blantyre.



A.C. Chipeta
JUDGE