IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil cause number 3053 of 2002

Between

RIAZ LAMBAT t/a TRUCK TRAILER Plaintiff

And

LEYLAND DAF LIMITED Defendant

CORAM: D. F. MWAUNGULU (JUDGE)

Ngwira, Legal Practitioner, for the plaintiff

Makhambera, Legal Practitioner, for the defendant

Fatchi, the official interpreter

Mwaungulu, J.

ORDER

The defendant, Leyland DAF Limited, appeals against the decision of the Assistant Registrar ordering that the plaintiff, Raz Lambat t/a Leyland Malawi Limited, cross-examine an officer of the defendant company. The plaintiff's request for cross-examination is in the context of an affidavit the defendant lodged in opposition to the plaintiff's application for summary judgement under the Order 14 of the Rules of the Supreme Court (Part 24 of the Civil Procedure Rules). The defendant actually lodged two affidavits: one sworn by the defendant's lawyer and the other sworn by the defendant company's officer. The officer introduces nothing in the affidavit. He just deposes that he adopts the defendant's lawyer's affidavit. The application for summary judgement has yet to be heard. It is bogged by the plaintiff's request, accepted by the Assistant Registrar, to cross-examine the company's officer on a defence of fraud the defendant alleged in the defence and affidavits.

On the authorities, confirming a practice that has stood for over a century, the company's officer need not be cross-examined on his affidavit. The plaintiff's motivation only to understand whether the witness grasps the facts deposed cannot overrun a practice of such pedigree. Mr Ngwira, the plaintiff's legal practitioner, relies on Carter Palor Co v Fastline (1882) 30 WR 880. In that case the court allowed cross-examination because the deponent relied on information from another servant. Cross-examination was necessary to test if the deponent had a grasp of matters deposed. That was in 1882 and correct on the facts. Order 41 of the Rules of the Supreme Court now provides that one can depose to hearsay provided one discloses the source. The case of Millard v Baddeley (1884) WN 96, decided two years later, underscores the court's lack of enthusiasm, a diffidence Megarry exemplified in Sullivan v Henderson [1973] 1 All ER 48:

" The present case seems to illustrate the difficulties that may arise if leave to cross-examine a witness on his affidavit is given in cases under RSC Ord 86. The summary process and RSC Ord 86 is one thing, and the trial of an action is another: a hearing under RSC Ord 86 with oral evidence is liable to become neither one nor the other, and to show the disadvantages of each. The hearing ceases to be summary, and the absence of pleadings and discovery, for example, prevents the hearing from achieving the exhaustiveness of a trial. The court may be put in a position, at the end of a two day hearing, of saying that there ought to be a trial of the action, in which case there will then be the repetition of much that occupied the court and the parties during the hearing under RSC Ord 86. I observe that r 5(3)(b) of the order, which authorises the making of an order for the defendant to attend and be examined on oath, qualifies the power by the words 'if it appears to the court that there are special circumstances which make it desirable that he should do so.' These are weighty considerations, and I would subscribe to the cautionary words of Field J in Millard v Baddeley, uttered in relation to the corresponding procedure under RSC Ord 14. There may be cases where it is right to give leave to cross-examine, perhaps limited to a single point, although this has its own problems both for counsel and for litigants who are bursting to reveal all; and in any case I would expect cases in which it would be desirable for such leave to be given to be of comparatively rare occurrence."

The judge then said:

"At least this case may serve as a warning to others that proceedings under RSC Ord 86 are intended to be summary, and that serious procedural difficulties are likely to arise if oral evidence be admitted, save in truly exceptional cases, and with proper exceptions."

The caution is salutary and necessary in my judgement where, to do justice to the parties, avoid dilatory and reduce costs, rules of court intend to avoid a trial. The rule preserves cases where justice is only possible through a trial guaranteeing cross-examination and discovery over matters in dispute. Leave to cross-examine on a

summary procedure should be limited to one or few matters, which, if clarified, leave the summary process a just and proper manner of disposing the matter. Leave to cross-examine is inappropriate where, like here, there are serious allegations of fraud that should be resolved through trial.

I therefore allow the appeal. The Assistant Registrar should consider the summary procedure application without cross-examination of the witness on his affidavit.

Made in Chambers this 29th Day of October 2003.

D F Mwaungulu

JUDGE