

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 2828 OF 2001**

HIGH COURT  
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**BETWEEN**

**COLOMBO MOTORS LIMITED .....PLAINTIFF**

**AND**

**NATIONAL BANK OF MALAWI .....DEFENDANT**

**CORAM: TEMBO, ASSISTANT REGISTRAR**  
**Masumbu, Counsel for the Plaintiff**  
**Kalua, Counsel for the defendant**

**ORDER**

This is this court's order on the plaintiff's application for an order that the defence be struck out for the defendants' failure to give discovery of some specific documents herein.

The then Deputy Registrar ordered on 13<sup>th</sup> January, 2004 that the defendant give specific discovery of all documents evidencing the remittance of funds by itself to the supplier of the eleven motor vehicles which are the subject-matter of the instant action. The plaintiff strongly contended that the documents given in discovery by the defendant are not the ones relating to the order of the then Deputy Registrar.

An affidavit purporting to be filed by the Managing Director of the plaintiff was filed in support of the instant application. A supplementary affidavit was also filed by Mr Jayawardena stating that he adopts the supporting affidavit having sworn it on behalf of the plaintiff's Managing Director under a power of Attorney.

The defence objected to the use of the supporting affidavit herein on the ground that the supporting affidavit did not mention that Mr Jayawardena was not the deponent or that he was signing on behalf of the plaintiff's Managing Director. And further that the power of attorney referred to in the supplementary affidavit of Mr Jayawardena is not exhibited at all.

The plaintiff's counsel argued that even though the power of attorney had not been exhibited, a deposition by Mr Jayawardena that he had a power of attorney to sign the supporting affidavit was sufficient to warrant the use of the said supporting affidavit.

This is a point that this court would like to deal with on a preliminary basis before a further examination of the arguments by both sides.

This court notes that indeed Mr Jayawardena ought to have mentioned in the supporting affidavit that he was signing on the strength of power of attorney and he should have exhibited a copy of the said power of attorney. But that as may be this court has discretion to allow the use of a defective affidavit. And in the present case where by his supplementary affidavit Mr Jayawardena admits the defect in the supporting affidavit and adopts the contents of supporting affidavit in his supplementary affidavit this court allows the plaintiff to rely on both affidavits. This court shall now turn to deal with the merits of the instant application.

The order of the then Deputy Registrar was that the defendant give specific discovery of documents relating to the remittance of funds by a third party LKS Autocare International Limited in relation to the purchase of eleven motor vehicles herein. The plaintiff asserts that the defendant has failed to give discovery of such documents. The plaintiff demonstrated this fact by referring to inconsistencies between documentation given in discovery by the defendant and those that the plaintiff has. And further by showing that the third party must not have been in existence at the time of the alleged remittance of funds which fact is denied by the defence.

On the contrary the defence through the affidavit of Mr Makiyi has pleaded compliance with the order of the then Deputy Registrar. That the defence has done all it could in compliance with the said order. The defence asserts that it has given discovery to all the documents it has in line with the order of the then Deputy Registrar.



This court has noted that the order for specific discovery was for a class of documents namely, those evidencing remittance of funds to the supplier of eleven motor vehicles in Japan.

This court notes that the instant application is not a summary judgment application but an application to determine whether the defence has willfully defaulted in complying with the order of the then Deputy Registrar.

The plaintiff submits that the documents supplied by the defence refer to different Exchange Control permits whereas the plaintiff makes reference to and used only one exchange control permit number to pay for the eleven motor vehicles herein. Further that the invoices by the defence herein do not have SGS stamps whereas those of the plaintiff do have SGS stamps. This line of thought by the plaintiff is reminiscent of a summary judgment application. This court cannot at this stage go into a protracted and minute examination of the documents herein.

This court is of the view that what it has to rightly consider is whether the documents supplied by the defence relate to the remittance of funds by the 3<sup>rd</sup> party to the supplier of eleven motor vehicles in Japan. The falsity or truthfulness of such documents will have to be determined at trial if necessary. But at this juncture this court has to satisfy itself if on the face of it the documents supplied by the defence are in relation to the class of documents ordered to be given in specific discovery namely those evidencing remittance of funds herein.

This court is satisfied that the defence has given in discovery some exchange control permits referred to by counsel for the plaintiff as Ex. 9 documents. Some of these are said to be dated September 1998, some are dated June 1998. The question whether these are the ones used in payment for the eleven motor vehicles herein or not shall be determined at trial. And the view of this court is that at this stage this court cannot say whether these Ex. 9 documents do not relate to the remittance of funds in question herein.

A lot of other issues were raised, for instance as to when the third party started trading which is a matter in issue that can properly be resolved at trial.

In the circumstances of this case this court does not find any willful default or negligence on the part of the defence in complying with the order for specific discovery.

And hence, the instant application is declined with costs to the plaintiff.

*Made in Chambers* at Blantyre this .....<sup>6<sup>th</sup></sup>.....October 2004.

  
M. A. Tembo

**ASSISTANT REGISTRAR**

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