

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 711 OF 2004**

BETWEEN

KAYENDA TOURS APPLICANTS

-AND-

GLENS (MW) LTD DEFENDANTS

CORAM : CHOMBO, J.

: Theu, Counsel for Applicants
: Chirwa, Counsel for Respondents, Absent
: Kafotokoza, Court Interpreter

RULING

The circumstances that gave rise to this application were that on 9 November 2005 the Assistant Registrar granted judgment on admission in favour of the applicants. The respondents, not being satisfied with the said decision, filed a notice of appeal at the Principal Registry and in this court on 14th December, 2005. The court set down the case for hearing of the said appeal for 15th February, 2006. The said notice was never served on the applicants' lawyer. Just before the 15th of February 2006 the respondents' lawyers' secretary phoned the applicants' lawyer to inform them that the respondents' lawyer was attending to another matter in Blantyre on the same date. Since 15th February 2006, the respondents have not followed up the matter and the notice of assessment of damages issued in March 2006

remains unendorsed with the date of hearing. It is the applicants' prayer that the appeal be dismissed as, by the conduct of the respondents, the applicants will be denied the fruits of the judgment.

The respondents filed skeletal arguments on the said appeal denying liability. It was their submission that Khumbo Mphande, being a mere Customs Clearing Clerk cannot bind the respondents. And further that the two parties' dealings over a period of time were adequate for the applicants to know that the said Khumbo Mphande was not the directing mind of the company.

In order to determine the matter it is necessary to look at one or two issues:

- (a) was there an established practice between the parties that would have led the applicants to conclude that the said Khumbo Mphande had no authority to bind the respondents.
- (b) was the said Khumbo Mphande a servant of the respondents, acting in the ordinary course of his employment.
- (c) are the respondents liable for the acts of their employee?

It was submitted by the respondents that the applicants, from their established practice with the respondents should have known that the said Mr. Mphande did not have powers to bind the Company. The respondents have not led any evidence to substantiate this matter, or to show to court in

what way the said “practice” should have been apparent to the applicants that Mr. Mphande was not in a managerial position. Without proper proof of this allegation the court has nothing to base any findings on. Further, the fact that Mr. Mphande does not or did not have the capacity to bind the respondents is an internal matter and the respondents must not be allowed to claim that the said Mr. Mphande had no authority to bind the company in that particular way. Mr. Mphande was employed by the respondents as a Customs Clearing Clerk. Clearing vehicles is one of the duties of a Customs Clerk and it is one of the functions that he performed on that specific day. Mphande was therefore acting within his course of employment when he did acts that the respondents now seek to distance themselves from.

It was held in *Harvey v R.G. O’Dell Galway (3rd party) {1958} 2 Q.B.* 78 that:

“An act done by a servant will not necessarily be excluded from the course of the servant’s employment merely because it is not an act which the servant is actually employed to perform. Provided that it is reasonably incidental to the employment the master will remain responsible.” (Underlining supplied for emphasis).

The acts done by Mphande, in checking what was missing in the vehicle before delivery of the same were incidental to his work. The respondents can not therefore now claim that Mphande was acting outside his authority and without the sanction of the respondents.

Lord Diplock in *Freeman and Lockyer v Bakhurst Park Properties (Mangal) Limited* [1964] 2 QB 480 at 504 stated as follows:

“An apparent authority ---- is a legal relationship between the principal and (third party) created by a representation made by the principal to the (third party), intended to be and in fact relied on by the (third party), that the agent has authority----- “

When the respondents made Mphande the Customs Clearing Clerk, they did make a representation to the applicants (and all others dealing with the respondents) that Mphande, as their agent, had the authority of the principal (the defendant) to act in a particular capacity. The respondents must therefore now not be seen to take away the authority because of some situation adverse to their interests.

I must find therefore that the order of the Assistant Registrar must be upheld.

On the matter of the appeal made by the respondents, it indeed does appear from the conduct of the respondents that their act is in bad faith. Not only is there inordinate delay in prosecuting the summons but there is also no machinery put in process by them for the said appeal to be determined by court.

Every successful litigant must be allowed to enjoy the benefits of his/her litigation. It is now two years since the said order was made in favour of the applicants. As will be appreciated, money devalues and any continued

delays in the matter will result in the applicants being denied the full value of their money. I must therefore dismiss the respondents' application with costs.

MADE in Court this 12th day of December, 2007.

E.J. Chombo
J U D G E