IN THE MALAWI SUPREME COURT OF APPEAL
30TH DAY OF JULY 2008 AT BLANTYRE
M.S.C.A. Civil Appeal No. 28 of 2007

(Being High Court Civil Cause No. 511 of 2006)

BETWEEN:

NIZAM ABDUL LATIF……APPELLANT

- and –

MANICA (MALAWI) LIMITED……..……RESPONDENT

BEFORE: THE HON. CHIEF JUSTICE SC, JA
THE HON JUSTICE MTAMBO SC, JA
THE HON JUSTICE TAMBALA, SC, JA
Mr Salimu of counsel for the Appellant
Mr Katuya of counsel for the Respondent
Luckson Beni, official interpreter
Mrs L. Kasasi, typesetter

JUDGMENT

Tambala SC, JA

The appellant who was an unsuccessful claimant in interpleader summons brought before Potani, J., applied to the court before a single Justice of Appeal to be allowed to adduce fresh

evidence during the prosecution of his appeal before this court. TEMBO, J.A, who heard the application dismissed the appellant's prayer in a ruling made on 11th February, 2008. The appellant now appeals against that decision.

The dispute between the appellant and the respondent arose out of a contract of transportation of goods by land made between Mr Mahomed Amad and the respondent about October, 2005. In the performance of that contract, the respondent, which carries on business as a freight forwarder, moved Mr Amad's goods from Malawi to Johannesburg in the Republic of South Africa. The agreed contract price was K3,945,269.00. Mr Amad has since failed to pay the agreed sum. On 26th April 2006, the respondent obtained judgment against Mr Amad for the contract sum of K3,945,269.00 with interest and costs.

The respondent tried various ways of recovering the judgment debt from Mr Amad, including negotiations and threats of obtaining an order of bankruptcy against the judgment debtor, but all such attempts proved futile. Then between September and October 2006,

Mr Amad told the respondent that he expected to receive a consignment of about 400 tons of cotton seed oil cake shipped from Mozambique to Blantyre in eleven (11) train wagons. He requested the respondent to forward the goods to Johannesburg, South Africa where he would sell the goods. He promised to pay the freight charges and the outstanding judgment debt from the proceeds of the sale of the goods in South Africa. The respondent could not trust that Mr Amad would honour the promise to pay for the services rendered by them. They proceeded to obtain a warrant of execution to recover the judgment debt and using the information received from Mr Amad, they instructed the Sheriff of Malawi to seize his goods when they arrived in Malawi. So, on 10th October 2006, 11 train wagons carrying Mr Amad's cotton seed oil cake were seized by the Sheriff of Malawi in execution of the writ of **Fieri Facias**. Mr Amad then approached the Sheriff and pleaded with him to release the goods. He offered to pay Sheriff fees and expenses by instalments. The offer was rejected by the Sheriff.

On 20th October 2006, the Sheriff of Malawi received a letter from Mr Nizam Abdul Latif, the appellant. The letter protested the

seizure of the cotton seed oil cake on 10th October 2006. The appellant explained, in the letter, that the goods belonged to him and not Mr Amad. He contended that the consignment had nothing to do with the case between Mr Amad and the respondent. Following the letter from the appellant, the Sheriff of Malawi took out interpleader summons which led to the decision of POTANI, J., of 12th December 2006, the subject of the present appeal.

The general rule with regards to applications to adduce fresh evidence on appeal, is that the law discourages production of such evidence on appeal. Thus rule **24 of Order 111 of the Supreme Court of Appeal Rules** begins with a statement –

> *"It is not open as of right to any party to an appeal to adduce new evidence in support of his original case."*

However, as an exception, the court has discretion to allow introduction of new evidence on appeal when that is required in **the furtherance of justice.** The case of **Ladd vs. Marshal [1954] 3 ALL**

ER 745 laid down some principles which would guide the court in exercising its discretion to allow fresh evidence on appeal. There are three principles as follows –

a. *It must be shown that the evidence could not have been obtained with reasonable diligence during trial;*

b. *The evidence must be such that if given, it would probably have an important influence on the result of the case, though it need not be decisive; and*

c. *The evidence must be credible, though it need not be incontrovertible.*

With regard to the second principle, **Lord Hansworth M.R.** in the court of Appeal in England said:-

> *"That evidence must be of such a character that not merely is it relevant but of such importance that it would*

> *have affected the judgment of the tribunal if it had been before them at the original hearing of the case: See* ***The King vs. Copestake [1927] 1 KB 468 at 474.***"

In support of the application to adduce fresh evidence learned counsel for the appellant submitted before TEMBO J.A., that the decision of POTANI, J, in the court below turned on the evidence of Mr Chinkhandwe, a witness for the respondent who stated that at a meeting with Mr Amad and some officers of the respondent, Mr Amad disclosed that he had imported cotton seed oil cake in 11 train wagons and he gave the numbers of the wagons and that those numbers matched with the numbers of the wagons which carried the goods seized by the Sheriff of Malawi.

In his ruling, rejecting the application to adduce new evidence TEMBO, J.A., made it very clear that the evidence relating to the disclosure by Mr Amad, that the imported goods would be carried in 11 wagons and the numbers of such wagons, was not one of the

important factors which influenced the decision of Potani, J. The learned Justice of Appeal observed that the decision of the learned judge, in the court below, turned on a finding of fact that during the negotiations with representatives of the respondent regarding how he would settle the judgment debt, Mr Amad disclosed that the goods which he had imported from Mozambique and which would be arriving in 11 train wagons were **his** property (*emphasised supplied*.) The other factor which crucially influenced the learned Judge in the court below was the fact that when the goods were seized by the Sheriff of Malawi it was not the appellant who rushed to protest the seizure and demanded the release of the goods, but it was Mr Amad who demanded the release of the goods and offered to pay Sheriff fees and expenses by instalments. Mr Amad did not disclose to the Sheriff that the goods belonged to the appellant and that he was acting on his behalf. Clearly, the Sheriff believed that the goods belonged to Mr Amad.

The learned Judge quoted a long passage from the ruling of Potani, J., containing the factors which importantly influenced the decision which he made in his ruling. The disclosure of the wagon

numbers by Mr Amad is not mentioned in that passage. We would, therefore, agree with the learned Justice of Appeal that the new evidence sought to be introduced by the appellant would not have an important bearing on the decision of Potani, J., that the goods seized by the Sheriff were not the property of the appellant, but belonged to Mr Amad, the judgment debtor, of the respondent.

In his submissions before us, Mr Katuya representing the respondent stated that according to the witness statement made by Mr Frank Chinkhandwe, there were two relevant meetings where Mr Amad and representatives of the respondent met to negotiate how Mr Amad would settle the judgment debt. He said that there was a meeting of 6th September 2006, when Mr Masiku, then counsel representing Mr Amad was present. He said the disclosure that the goods would arrive in 11 train wagons and the numbers of the wagons was not made on that date. He said that there was another meeting of 6th October 2006, when the material disclosure was made by Mr Amad; but on that occasion Mr Masiku was not present. Mr Katuya's submission appears to be born out by Mr Chinkhandwe's written statement of 24th November 2006. It would, therefore, seem

to us that if learned counsel for the appellant applied during the hearing of the interpleader summons to call Mr Masiku for the purpose of contradicting Mr Chinkhandwe on the disclosure of wagon numbers by Mr Amad, such application would have been rejected on the ground that the evidence sought would be irrelevant. If Mr Masiku's evidence was irrelevant at the time of hearing the summons, it would not become relevant now, on appeal.

Considering the evidence on record, and how Mr Amad appears to have so far succeeded in frustrating attempts by the respondent to recover the judgment debt, we are unable to see any **interest of justice** which could be furthered by allowing Mr Masiku to give his new evidence at the 11th hour. The application to introduce fresh evidence was properly, in our view, rejected by the learned Justice of Appeal. The present appeal is, therefore, unsuccessful. It is dismissed with costs.

PRONOUNCED in open court on this…….day of October 2008 at Blantyre.

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L. G. Munlo
HON CHIEF JUSTICE SC, JA

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Hon Justice D. G. Tambala SC, JA

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Hon Justice I. J. Mtambo SC, JA