

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1987 OF 1994

MANGULA TRANSPORT AND SALES(PRIVATE) LTD.....PLAINTIFF

AND

MALAWI INTERNATIONAL TRANSPORT CODEFENDANT

CORAM : R R Mzikamanda, Senior Deputy Registrar
Mr Banda for the plaintiff
Mr Ng'ombe for the defendant

RULING

Mr Banda representing the plaintiffs filed summons for direction under which he seeks direction as to how the trial in the matter should proceed. He also seeks to amend to the writ of summons as well as the statement of claim in the manner already filed with the summons.

Mr Ng'ombe for the defendant opposed the application for various reasons. He sees the application to amend as having been prompted by his own application to have the action dismissed under Order 111 rule 7 of the Rules of the High Court. This application was filed on 20th December, 1994 while the original summons for directions was filed on 3rd November, 1994. The application to dismiss action has never been prosecuted. During the hearing of the summons for direction Mr Ng'ombe sought to bring out the reasons for his earlier application. He sought certain particulars including whether Mangula Transport and Services is registered in Malawi under the Companies Act as well as an admission that some of the invoices supporting the claim originated from different companies from Zimbabwe and Botswana. The claim is for 27,865 Zimbabwe dollars.

The application is also opposed on the ground that this action is a duplication of a pending action in Civil Cause No.

241 of 1994 where all the invoices appear also in the present action. Mr Ng'ombe said what he sought was not to dismiss the action but an order for further and better particulars on the identity of the parties suing, the monies claimed by the plaintiffs and thirdly whether the plaintiffs intend to proceed with the two actions. For these reasons Mr Ng'ombe submits that the present matter is not ready for trial. Civil Cause 241 of 1994 is ready for trial.

I must say at the outset that my primary function at the moment is to consider the application which has been prosecuted. In doing so I must decipher those aspects which need considerations under the application.

The first point to be considered is that Mr Banda is applying for leave to amend the writ of summons in the manner filed with the application. Order 20 rule 5 makes provision for amendment of writ or pleading with leave. Order 20 rule 5 subrule 1 provides that the court may at any stage of the proceedings allow the plaintiff to amend his writ on such terms as to costs or otherwise as may be just and in such manner as it may direct. Order 20 rule 5 sub rule 3 provides that an amendment to correct the name of a party may be allowed notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue. Mr Ng'ombe opposes the application to amend. He has given two reasons for the objection. I must confess that I find it difficult to appreciate the first reason for the objection. One has to search through Mr Ng'ombe's submission to trace the first reason. It would appear that the amendment should not be allowed because there is on file an application to dismiss the action under Order 111 rule 7 of the High Court Rules. That application has been dormant. It has not been prosecuted. It was not prosecuted on the date it was set down for hearing and the defendant made no effort to ensure that the summons is prosecuted. It seems to be the case also that Mr Ng'ombe contends that the plaintiff cannot amend because they have not answered to the defendant's question for an admission that the invoices supporting the claim originated from two companies one from Botswana and the other from Zimbabwe. What Mr Ng'ombe seems to be seeking here is further and better particulars. I have searched the file. There is no order for further and better particulars. The third aspect which seems to be apparent in Mr Ng'ombe's objection to an order for direction which in this case would include leave to amend is that the matter is not yet ready for trial. This he says is so because there are certain matters which need to be clarified before the matter can go for trial. It is trite that a matter will be ready for trial when the pleadings are closed or are deemed closed. In this case the defendants served the plaintiffs with a defence on 31st October 1994. That defence contains no counterclaim. In terms of Order 18 Rule 20 Subrule I of R.S.C. the pleadings are

deemed to be closed-

- (a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to a counterclaim, after service of the defence to counterclaim, or
- (b) if neither a reply nor a defence to counterclaim is served, at the expiration of 14 days after service of the defence.

In terms of Order 18 rule 20 subrule 2 the pleadings in an action are deemed to be closed at the time as above notwithstanding that any request order for particulars has been made but has not been complied with at that time.

The closing of pleadings is of vital significance because among other things it fixes the date by reference to which the summons for directions in the action must be issued. The plaintiff is obliged under Order 25 rule 1 to take out a summons for directions within one month after the pleadings in the action are deemed to be closed. In the present case pleadings were closed when the defence was served on 31st October, 1994 and on 4th November, 1994 the plaintiff took out summons for directions in compliance with Order 25 Rule 1. It is therefore difficult to appreciate why the defendant should argue at this hour that the matter is not yet ready for trial.

The second reason for the objection as raised by Mr Ng'ombe is that the present action is a duplication of a pending action in Civil Cause No. 1 241 of 1994. Invoices in that matter appear on the action in Civil Cause No. 1987 of 1994 and clarification has been sought in view of the embarrassment that duplication has caused to the defendant. Mr Banda argues that if that is the position then the defendant has a good defence to the action although he contends that the position is not thus. I must hasten to say that I have not seen file No 241 of 1994 nor have I seen the invoices being referred to. Moreover I do not think that it is my business now to look at these when I am considering a summons for directions. There has been no application to have the matter in Civil Cause No. 241 of 1994 consolidated with the present matter.

As regards leave to amend I am satisfied that this is a proper case where leave must be granted to the plaintiffs to amend the writ in terms of Order 20 rule 5 subrule 3 of the R.S.C. I grant leave to amend. The service of the amended writ to be dispensed with but statement of claim attached to the amended writ to be served within 14 days hereof.

I also order the other directions sought in the following manner-

- (a) trial shall be at the Principal Registry of the High Court of Malawi before a single judge sitting alone without a jury on a date to be fixed by the Registrar.
- (b) discovery shall be by exchange of lists of documents verified by affidavits within 14 days and inspection of the said documents shall be within 7 day thereafter.
- (c) the case is rated at 'C'.
- (d) the case to be set down by 31st May, 1995.
- (e) Costs in the cause.

MADE in Chambers this 26th day of April, 1995 at Blantyre.



R R Mzikamanda
SENIOR DEPUTY REGISTRAR