

IN THE HIGH COURT OF MALAWI**PRINCIPAL REGISTRY****CIVIL CAUSE NUMBER 957 OF 1994****BETWEEN****SHIPTRADE INTERNATIONAL COMPANY LIMITED
PLAINTIFF****AND****TRANSGLOBE PRODUCE EXPORTS
DEFENDANT****CORAM: MWAUNGULU, J**

Nampota, for the plaintiff
Chirwa, for the defendant
Daudi, Official Interpreter

Mwaungulu, J**ORDER**

This is an appeal from the order of the Registrar dated 25th July, 1995. In that order the Registrar set aside a consent order filed with the Court by the parties. The order was to the effect that a judgment, conceded to be irregular, be set aside and the defendant is allowed to proceed to the next step in the action. Unfortunately, at the time of the application the plaintiff had already taken out a warrant of execution. The sheriff had been to the defendant's premises. It is unclear whether execution had been levied. The sheriff however had collected his expenses and fees under the Act. There was a term therefore in the consent order to the effect that the sheriff should surrender. The defendant applied ex parte to have the warrant of execution stayed. There was therefore in the consent order to set aside the judgment a term to the effect that the sheriff should refund the sheriff fees forthwith. This provision in the consent order sparked a lot of problems in these proceedings. Most of these would have been avoided if there had been recourse to the proper procedure of dealing with disputes on consent judgments or orders.



The first problem arose during the summons for directions. The Registrar refused to give directions for trial. The problem arose because the sheriff, properly in my judgment, refused to pay the defendant the sheriff fees as was stipulated in the consent order. So when the plaintiff took out the summons for directions, the defendant objected to the Registrar giving the directions without first resolving the matter. The Registrar's refusal was appealed from. The matter came before a judge who held, again properly I think, that the Registrar could not refuse to give directions on that pretext. The judge did not consider the nature of the order before him. I mean the consent order. He did say however that the consent order was binding and that the sheriff should abide by it. The sheriff should therefore have paid the sheriff fees forthwith as the plaintiff and defendant had agreed.

The sheriff however was not a party in the proceedings between the plaintiff and the defendant. He was not even a party to the consent judgment between the plaintiff and the defendant. What was missed in the proceedings before this one is the nature of a consent order. An order by consent in an action is not a contract. Nevertheless it is sufficient evidence of the contract on which it is based. It is no less a contract because it has the imprimatur of the Court (Wentworth -v- Bullen (1840) 9 B & C 840; Lievesley -v- Gilmore (1866) L.R. 1 C.P. 570; Conolan -v- Leyland (1884) 27 Ch. D. 632, 638). Where therefore a consent order represents an agreement which amounts to a contract between the parties, the court will treat it like it would any contract (Tigner-Roche & Co. -v- Spiro (1982) 126 S.J. 525; General Accident, etc., Assurance -v- I.R.C. [1963] 1 All E.R. 618). One such principle is privity of contract. The general rule is that a contract only binds the parties to it. The contract cannot as a general rule confer rights or impose obligations on anyone else other than the parties to it. The consent order obtained in this matter could not create obligations for the sheriff of Malawi. Neither could it because it had the sanction of the Court. The judge could not therefore compel the Sheriff to pay the fees to the defendant forthwith in pursuance of an agreement between the parties to the action to which the sheriff was not a party.

Faced with the sheriff's refusal to pay the sheriff fees the defendant applied to the Registrar to have the order of consent set aside. The Registrar granted the order precisely because the sheriff was not a party to the consent order. He thought that the consent order was made under mistake of fact that the sheriff could be compelled to pay the sums to the defendant. Much has been said about whether this was a mistake on a point of law or fact. It has been said before me, correctly in my view, that if the mistake is on a point of law the consent order cannot be set aside. It has been said as well that the mistake here

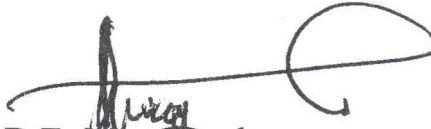
was on a point of fact and the court below could properly set the order aside. Even in the argument of the appeal before me much has been said on these aspects. It is unnecessary for me to consider these issues in view of the course I intend to take on the matter. As I mentioned earlier, much of the ado in this matter would have been avoided if the hearings before this one had approached the problem from the nature of a consent order.

A judgment or order by consent is binding on the parties until set aside. It also acts as an estoppel (Kinch -v- Walcott [1929] A.C. 483; Law-v- Law [1905] 1 Ch. 140,158). The parties can appeal against it. They however need the leave of the Court. The order can be set aside, but only by a fresh action on the same premise as would invalidate a contract (Huddersfield B. Co. -v- Lister [1895] 2 Ch 273; Re S. American, etc., Co. [1895] 1 Ch. 37, 44). A court has no jurisdiction to vary a consent judgment or order made previously in that court and therefore the only means open to a party to set aside a consent order or judgment on fraud, mistake or misrepresentation is by a fresh action for that purpose(de Lasala -v- de Lasala [1980] A.C. 546).

Here the defendant did not proceed by a fresh action. Instead he applied on this action to have a contract rescinded. This he could not do on this action. The Registrar had no jurisdiction to set aside the consent order without a fresh action for that purpose. If a fresh action was taken, it would have allowed the parties to raise the factual and legal basis for the alleged mistake. I would therefore allow the appeal. The order of the Registrar setting aside the consent order is set aside. The plaintiff is entitled to costs of the application.

The plaintiff wants me to decide what fees should be paid to the sheriff. I do not think I can do that. That should be done by the master first. There is an application before him anyway. I am not aware of the fees that the sheriff has claimed. It seems to me that if there is a dispute between what the sheriff claims and what the other party claims the sheriff should claim there can be a taxation. No bill has been lodged with the Court. On the course that I have taken on the matter it is unnecessary to consider the other matters raised in the appeal. This Court has no power to set aside a consent order even if the order has its imprimatur. The parties, if there are problems with the order, can appeal against the order or proceed with an action to set aside what is otherwise an agreement between them.

Made in Chambers this 15th Day of September, 1997.



D.F. Mwaungulu
JUDGE