IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.25 OF 1988
(Being Civil Cause No.490 of 1988)

BETWEEN:

MTEMADANGA FARM LIMITED.....**APPLICANT**

- and -

AGRICULTURAL DEVELOPMENT & MARKETING CORPORATION.....**RESPONDENT**

Before: The Honourable Mr. Justice Kalaile
Nyirenda, Counsel for the Applicant
Pitman, Counsel for the Respondent
Chigaru, Court Clerk

RULING

On 8th September, 1988, Mtegha, J. gave a ruling in which he refused to grant an interlocutory injunction to Mtemadanga Farm Limited restraining the respondent from selling a farm known as Rathdrum Farm until after an action by the applicant for specific performance was determined at a full trial.

As is to be expected there are now two hotly contested sides of the events as seen by the two parties. The applicant deposed to the following facts through one of its directors, Mr. Clement Karim Khembo. That the applicant company was by an order by consent dated 17th June, 1988, and granted by the High Court required to give evidence of its ability to pay the balance of the purchase price (upon prior payment of the deposit) and not to appropriate any money to the use of the respondent. Further, that the request by the respondent in the letter dated 30th June, 1988, issued by Messrs Sacranie, Gow and Company was unreasonable and unnecessary insofar as the Court order dated 17th June, 1988, was concerned. The Court order was framed thus:

> "(a) That the action in this matter be withdrawn by mutual consent subject to both parties paying their own legal costs;
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> (b) That the sale of Rathdrum Estate to the plaintiff takes place on the following terms -
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> (i) purchase price K350,000 for the land, buildings and fixed assets;
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> (ii) K60,000 for livestock;
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> (iii) other miscellaneous items such as fertilizer and chemicals, etc. at a price to be agreed;

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(vi) payment method:

a) Non-refundable deposit of K30,700 to be paid within 14 days calcuted from the 17th June, 1988;

b) Within 30 days from the 17th June, 1988, the plaintiff will provide documentary evidence to the satisfaction of the defendant that the plaintiff has the necessary finance to pay the balance of the purchase price. The balance of the pruchase price to be paid on the signing of a formal sale agreement.

(v) Subject to Malawi Government consenting to the proposed sale under section 24(a) of the Land Act;

(vi) Payment of all legal costs to the account of the plaintiff."

It will be seen that the applicant considered the terms of the following letter from Sacranie, Gow and Company to be unreasonable. Before looking at the Sacranie letter, it is pertinent to point out that Freight Link (M) Limited is a company in which Mr. Khembo is a majority shareholder and sole signatory to the bank account. At the material time Freight Link had in its bank account the sum of K277,215.44.

The respondent requested the applicant "That the monies to be provided should be placed into an account with an irrevocable instruction to the bank that this money is not to be withdrawn". The money under reference was the sum of K277,215.44 which was in Freight Link's account. The quoted statement is what the applicant found to be unreasonable and therefore unacceptable.

According to the applicant, Messrs. Agason Motors Limited offered the applicant a loan in the sum of K110.000.00 but because of certain misrepresentations made by Mr. John Pitman, the respondent's legal counsel in these proceedings, the loan fell through.

Essentially, this was the stand on which the application for the grant of an interim injunction was grounded. Let us now turn to the state of events as seen in the eyes of the respondent as deposed in the affidavits of Mr. John Magombo, the General Manager of ADMARC and of Mr. M.J. Mpeta Phiri, as well as that of Ismail Panjwani.

Mr. Magombo deposed to the facts that the applicant furnished the respondent with Freight Link's balance sheet as documentary evidence of the applicant's ability to pay the balance of the purchase price. As a result, Mr. Pitman wrote the applicant's counsel the following letter:

"30th June, 1988
T.C. Nyirenda & Co,
P.O. Box 2420,
BLANTYRE.

Dear Sir,

PURCHASE OF RATHDRUM ESTATE

We refer to your letter of the 29th June, 1988 and advise that our clients' instructions are that the copy bank statements and letters are not sufficient evidence of your clients' ability to pay the balance of the purchase price. They request that the monies to be provided should be placed into an account with an irrevocable instruction to the bank that this money is not to be withdrawn. At the present moment there is nothing stopping Freight Link (M) Limited from withdrawing the amount shown in the statement. In respect of the sale of tyres the proposed purchase to Ngolanga Wholesalers may not ever take place. We therefore await hearing from you in due course.

Yours faithfully,

J. Pitman
for: SACRANIE, GOW & CO."

The deposit was duly paid under cover of a letter dated 1st July, 1988. On 18th July, 1988, the applicant's legal counsel supplied further evidence of the applicant's ability to pay the balance of the purchase price by enclosing a letter from Agason Motors Limited in which a loan of K110.000 was offered to Mtemadanga Farm Limited for the purchase of Rathdrum Estate. On 16th August, 1988, Mr. Panjwani of Agason Motors Limited wrote Sacranie, Gow & Co. with a copy to Mtemadanga Farm Limited indicating that the loan was no longer available to Mtemadanga.

Mr. M.J. Mpeta Phiri, an Assistant General Manager of ADMARC, deposed to the effect that Rathdrum Farm consists of 924.83 acres and is used mainly for growing burley and flue-cured tobacco, maize and lastly has a dairy farm. That all farming activities except the dairy on the said farm stopped running when the farm closed operations by the end of July, 1988, in anticipation of signing a sale agreement between the parties to these proceedings. That the respondent expected the purchaser to move in immediately and, consequently, the respondent has neither made any nursery preparation for cultivation of land nor made provision for soil conservation measures so that the land and farm equipment has remained idle throughout.

Mr. Mpeta Phiri finally deposed to the fact that if an injunction were to be granted to the applicant restraining the respondent from selling the said farm, then no other purchaser will be in a position to occupy the land and prepare it for cultivation until the following

season thereby causing irreparable damage to the farm which may not be compensated for in terms of damages.

Mr. Panjwani's depositions were to the effect that he was only prepared to offer a loan to the applicant on condition that certain securities were made available to him. As these were not forthcoming, he withdrew the loan facility from the applicant.

The first ground of appeal filed by the applicant is that the Honourable Judge erred in holding that there was no serious issue to be tried. Mr. Pitman took issue with this ground of appeal by pointing out that that was not the wording of the ruling by the Honourable Judge. Mtegha, J.'s Ruling states that:

> **"In my considered opinion the applicant has not satisfied me that there is a triable issue, because non-compliance with the Order entitled the respondent to cancel the sale, and this the respondent did."**

The words cited above cannot, with due respect, be said to mean that 'There is no serious issue to be tried'. Mr. Pitman argued before me that the position which the respondent toook before Mtegha, J. was that the application was frivolous and vexatious and that the applicant was using the court to delay the sale because he was unable to furnish proof of ability to pay the balance of the purchase price. Again, let us revert to the pertinent provision of the Court Order. It states:

> **"(b) Within 30 days from the 17th June, 1988, the Plaintiff will provide documentary evidence to the satisfaction of the Defendant that the Plaintiff has the necessary finance to pay the balance of the purchase price. The balance of the purchase price to be paid on the signing of a formal Sale Agreement."**

To my mind the underlined words provide the key to the issues to be determined. Did the applicant furnish documentary evidence to the satisfaction of the respondent? I do not think so. In paragraph 3(a) of his affidavit, Mr. Khembo deposed that his company was only required to give evidence of its ability to pay the balance of the purchase price and not to appropriate any money to the use of the respondent. I respectifully disagree with that deposition. Mr. Pitman's letter of 30th June requested that "The monies to be provided should be placed into an account with an irrevocable instruction to the bank that this money is not to be withdrawn". That request is not an appropriation of the applicant's money to the use of the respondent. The request conveyed in Mr. Pitman's letter is a perfectly proper one in my considered view. If the Freight Link account was under the sole control of Mr. Khembo, why was it necessary to obtain assurances from Ngolanga Wholesalers or to borrow money from Agason Motors Limited? Obviously the applicant knew that he did not have the ability to pay.

In fact, I would go further than Mtegha, J. by holding that this application is frivolous and vexatious as was argued by Mr. Pitman. It is my view that this application is not made bona fide but is so made merely to delay the proposed sale. This application falls within

the definition of the expression 'frivilous and vexatious' as stated by Lush, J. at p.859 in Norman v. Mathews (1916) 85 L.J.K.B., 857. In that case, Mr. Justice Lush observed that:

> "There is an inherent power in every court to stay and dismiss actions or applications which are frivolous and vexatious and abusive of the process of the court ..... In order to bring the case within the description it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that his alleged cause of action is one, which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the court."

The next ground of appeal was that the Judge having decided that he could not decide on the question of estoppel without evaluating the affidavits filed by the defendant, should have proceeded to grant an interlocutory injunction. Mr. Nyirenda did not supsport this ground of appeal with any argument or legal authority and for that reason alone, I see no merit in this particular ground of appeal.

The third ground of appeal was that the Judge should not have decided on the sufficiency of proof of ability to pay the balance of the purchase price as by so doing he embarked on a trial of the issues. In the course of dealing with the first ground of appeal, I have indicated at some length why I am of the opinion that the respondent failed to comply with the Court Order dated 17th June, 1988. In any event, my stand is in consonance with quite ancient legal authority as stated by Megarry, J. in Woodford v. Smith (1970) 1 All E.R., 1091 at 1093 Megarry J. opined that:

> "Counsel for the defendants also read me a passage in the Supreme Court Practice 1970, which runs as follows -
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> > 'It is not the practice of the Court (except by consent) to grant on an interlocutory application an injunction which will have the practical effect of granting the sole relief claimed (Dodd v. Amalgamated Marine Workers' Union). This does not deter the court from granting such interlocutory injunction as may be necessary to prepare property or prevent irreparable damage.'
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> When I ventured to assert that this did not represent the law, counsel for the defendants accepted that as being the case. I do not think that there is anything to prevent the court in a proper case from granting on motion substantially all the relief claimed in the action. It is true that in Dodd v. Amalgamated Marine Workers' Union it was said in the Court of Appeal that it was not the 'usual practice' or the 'general rule of practice' to grant on motion all the relief claimed in the action. But this language is general rather than absolute, the judgments are very brief, no reasons are given, and there have been later decisions. Thus in Bailey (Malta) Ltd. v. Bailey, Lord Denning M.R. flatly said that it seemed

> to him that there was 'no such rule.' In this, he based himself on what Sargant, L.J. had said in A.G. v. Stockton -on-Tees Corpn., where there is what I may call a reasoned demolition of the proposed rule, the basis of which seems to have been an objection to trying the same point twice over. In the Bailey case Harman, L.J. referred to the supposed rule as a theory which had in his view 'long been exploded': see also Heywood v. BDC Properties Ltd. and Booker v. James. I have ventured to refer to these authorities (which were not discussed before, since there was no need) because it is time that the passage in the Supreme Court Practice 1970 which I have read, received the firm touch of a revising hand".

That passage, to my mind, squarely disposes of the third ground of appeal.

The final ground of appeal provided that the Judge erred in holding that the application was intended merely to delay the disposal of the farm. Again, in the course of dealing with the first ground of appeal I already held that the application was, indeed, intended merely to delay the disposal of the farm since Mr. Pitman has eloquently demonstrated the applicant's inability to pay the balance of the purchase price.

That being so, I dismisss this application with costs to the respondents.

MADE in Chambers this 13th day of October, 1988, at Blantyre.

J.B. Kalaile
JUDGE