C.J.

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.3 OF 1987
(Being Civil Cause No.198 of 1983)

BETWEEN:

THE SHERIFF OF MALAWI.....APPELLANT

- and -

PRESS PRODUCE LIMITED.....RESPONDENT

Before: The Honourable the Chief Justice, Mr. Justice Makuta
The Honourable Mr. Justice Unyolo, J.A.
The Honourable Mr. Justice Mbalame, J.A.

Chatsika, State Advocate, for the appellant
Msaka, Counsel for the Respondent
Maore/Phiri, Court Reporters
Kadyakale, Law Clerk

JUDGMENT

Unyolo, J.

This appeal arises from a Summons to refund Sheriff fees. The facts of the case lie in a narrow compass and are as follows:-

A warrant of execution was issued against the respondent for the sum of K42,316.15. Dutifully the appellant went to the respondent's offices to execute the warrant in question. Execution was actually levied and several items were seized by the appellant. However before the appellant left the place it was agreed between the respondents and the judgment creditors' legal practitioners that the execution be suspended subject to the respondents paying the appellant's fees at 10% of the amount endorsed on the warrant. This came to K4,254.14 plus incidental costs. The respondents paid this sum and the warrant was accordingly suspended.

The case itself proceeded. The respondents applied to have the judgment set aside. They succeeded. The case then went to trial and in the end the action failed and was dismissed with costs. Thereafter the respondents applied to have the money paid to the appellant herein refunded to them. They argued that in terms of the relevant legislation they should have paid the sum of K4.20 only. The application was opposed and after hearing counsel in argument the learned Judge, Mtegha, J., came to the conclusion that the respondents' submission was made out and ordered that the amount overpaid be refunded. The learned Judge also ordered the appellant to pay the costs of the application. It is from that decision that the appellant now appeals to this Court.

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Six grounds of appeal were submitted. Two of these were however dropped at the hearing of this appeal and the remaining four grounds are as follows:-

(1) The Court below erred in holding that the Courts Act (Schedule) (Replacement) Notice of 1977 made in relation to item 23 of the said Schedule and made under section 32(2) of the Courts Act is ultra vires and repugnant to the Sheriffs Act.

(2) The learned Judge in the Court below failed to decide a vital issue, namely, what effect sections 47 and 48 had on the powers of the Chief Justice contained in section 32(2) of the Courts Act especially those relating to rules affecting Sheriff's fees and consequently the judgment of the Court below is vague and misleading.

(5) The decision was against the weight of established authority.

(6) The Court below clearly erred in ordering the Sheriff to pay costs of the proceedings before the said Court in view of section 45 of the Sheriffs Act which was brought to the attention of the said Court.

The controversy between the parties revolves around the interpretation to be put on certain pieces of legislation. The starting point is the Courts Act Cap.3:02. This Act came into force on 1st April, 1958. It had a Schedule and Item 23 thereof prescribed the fees payable to the Sheriff for seizure on warrants of execution. The fees prescribed then were K4.20. Significantly, section 32(2) of the Act conferred power on the Chief Justice with the approval of the Minister to revoke, replace or amend the said Schedule by notice published in the Government Gazette. On 1st February, 1968 the Sheriffs Act, Cap.3:05, was enacted and section 47 thereof empowers the Chief Justice (alone) to make rules prescribing the fees, poundages and allowances which the Sheriff may demand upon levying execution. In 1977 the Chief Justice revoked the Schedule and replaced it by a new Schedule. This was done by the Courts Act (Schedule)(Replacement) Notice, 1977, above-mentioned. This notice was made in exercise of the power conferred by section 32(2) of the Courts Act, already mentionend. By the new Schedule the Sheriff's fees prescribed under Item 23 became 10% of the amount due on the warrant or of the value of goods seized.

The point taken by the respondent in the Court below was that as far as Sheriff's fees were concerned the Schedule Replacement Notice was made under the wrong power. It was contended that this should have been made under the provisions of section 47 of the Sheriffs Act and not under section 32(2) of the Courts Act as was done. It was contended that the amendment herein was therefore invalid in so far as this particular Item, relative to Sheriff's fees, was concerned and that what happened here, by purporting to amend the said Item 23 by virtue of section 32(2) of the Courts Act, was ultra vires and repugnant to the Sheriffs Act.

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We have already said that section 47 of the Sheriffs Act gives the Chief Justice power to make rules, inter alia, prescribing the fees, poundages and allowances which the Sheriff may demand upon levying execution. And section 48 of the same Act provides for the saving of existing forms, fees, etc. It reads as follows:-

> "All forms prescribed for use in connection with the execution of judgments by a Sheriff, and all fees, poundages and allowances payable to him under any written law in force immediately prior to the commencement of this Act shall, until amended or varied by rules made under section 47 continue to be used or payable or allowable as if the same had been prescribed or fixed under rules made under section 47."

Pausing here it is to be observed that no rules have been made todate in pursuance of section 47 of the Sheriffs Act and the Sheriff has continued to demand his fees, poundage and allowances by virtue of the provisions of Item 23 of the new Schedule to the Courts Act, namely 10% of the amount of levy or 10% of the value of the goods seized.

After considering the provisions both of the Courts Act and the Sheriffs Act the learned Judge in the Court below had this to say:

> "It is clear, from the above analysis, that the Sheriff has been acting under the Schedule of the Courts Act as replaced; in any case, as if the Sheriffs Act had not been passed; in other words, the Sheriffs Act, as far as sections 47 and 48 are concerned, have been ignored. In my understanding and interpreting these two pieces of legislation the position is this, that if the rules pertaining to the Sheriff's fees, poundage, etc., were made under section 47 of the Sheriffs Act, then the Sheriff was entitled to levy the 10%; but they were made under section 32 of the Courts Act. The effect therefore, is that the original Schedule and in particular Item 23, at least as far as Sheriff's fees, etc., are concerned, have not been replaced or amended in accordance with section 47 of the Sheriffs Act, but still persist by virtue of section 48 of the same Act, i.e. K4.20."

The learned Judge then went on to agree in the submission that the purported amendment of Item 23 of the new Schedule to the Courts Act was ultra vires the Sheriffs Act and that the Sheriff was only entitled to K4.20 fees.

Pausing here we would like to express our gratitude to Counsel for the forceful argument they advanced and for the case-law authorities they cited at the hearing of this appeal. We found these quite useful.

The first question for our determination is whether the amendment of the Sheriff's fees herein, done under the Courts Act through the 1977 notice, was valid in the light of the provisions of sections 47 and 48 of

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the Sheriffs Act. Counsel for the appellant contended that this question must be answered in the affirmative. He submitted that it is significant that section 32(2) of the Courts Act, like section 47 of the Sheriffs Act, confers power for the prescribing of Sheriff's fees and that the 1977 Notice amended the said Sheriff's fees in exercise of such power. There is, we think, some substance in this submission as indeed section 32(2) does empower the amending of the Sheriff's fees by, as was done in the present case, replacing or amending the Schedule to the Courts Act which Schedule includes, as we have seen, Item 23 on Sheriff's fees. However section 48 of the Sheriffs Act literally suggests that any amendment of the Sheriff's fees after the enactment of the Sheriffs Act can only be validly done under section 47 of that Act. If this section is given this interpretation then the purported amendment of the Schedule in 1977, in so far as Sheriff's fees were concerned, was arguably a non-starter and invalid and the Sheriff's fees payable earlier, before the purported amendment, continued to be payable. The matter therefore resolves into a dilemma.

A useful case on this point is Omar Maunde v. National Bank of Malawi: Civil Cause No.330 of 1982 (unreported). In that case the defendant also challenged, as in the instant case, the validity of the amended Schedule herein in so far as Sheriff's fees were concerned. The argument there also revolved, as here, on the interpretation of section 32(2) of the Courts Act and section 47 and 48 of the Sheriffs Act. After considering these sections Skinner, C.J. as he then was stated:

> "Mr. Hanjahanja argues that in so far as Sheriff's fees are concerned the notice was made under the wrong power. He says it should have been made by virtue of section 47 of the Sheriffs Act and not under section 32 of the Courts Act. In his submission the amendment was invalid in so far as Sheriff's fees are concerned. But I think that his argument ignores the provisions of section 21(a) of the General Interpretation Act. Section 21 provides for general provisions with respect to the power to make subsidiary legislation and paragraph (a) reads as follows:
>
> > 'Where any subsidiary legislation purports to be made in exercise of a particular power or powers, it shall be deemed also to be made in exercise of all powers thereunto enabling'.
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> Now in the instant case the Courts Act (Schedule) (Replacement) Notice 1977 was made in exercise of the power containing in the Courts Act and, of course, the bulk of the fees provided for by the Notice were Court fees. But also by virtue of the provisions of section 21 the notice is deemed to be made in exercise of all powers thereunto enabling and one of the enabling powers is that contained in section 47 of the Sheriffs Act. I have considered the effect of section 48 of the Sheriffs Act and whether as a result of that section the poundage payable to the Sheriff under the Schedule as unamended continues but in my judgment it does not because of section 21(a) of the Interpretation Act. The effect of section 21(a) is that the Schedule was in law amended by rules also made under section 47 of the Sheriffs Act and undoubtedly a power to make rules providing for poundage is conferred by that section."

Counsel for the respondent submitted that the decision in the Maunde case is wrong and urged this Court not to follow it. Several points were taken by the learned Counsel. First, he pointed out that the Courts Act provides a different machinery for the making of subsidiary legislation on this question of Sheriff's fees from that provided under the subsequently enacted Sheriffs Act. In the former case the rules, as we have noted, may be made by the Chief Justice with the approval of the Minister while as in the latter case the Chief Justice alone may make such rules. Counsel submitted that there are two different powers which cannot be exercised simultaneously. He argued that since the Schedule to the Courts Act was amended not in the manner Sheriff's fees are intended to be amended, the purported amendment was not valid.

With respect, we are unable to join with learned Counsel in that view. In our judgment the section, section 21(a) of the General Interpretation Act, is wide and cannot be restricted in the manner suggested. As already indicated the subsidiary legislation in the present case was purportedly made in exercise of power conferred on the Chief Justice (of course with the approval of the Minister) by statute, namely section 32(2) of the Courts Act. This particular aspect is therefore covered by the first limb of section 21(a) and by the provisions of the second limb thereof the subsidiary legislation herein is deemed also to be made in exercise of all powers (underlining for emphasis) that enable the making of such subsidiary legislation. In other words, it will be seen that the facts here correlate entirely with the purport of the said section 21(a). In short, the subsidiary legislation herein must be deemed also to be made in exercise of the powers of section 47 of the Sheriffs Act.

Counsel for the respondent referred us to section 21(b) of the General Interpretation Act which provides that no subsidiary legislation shall be inconsistent with the provisions of any Act. We are mindful of this principle. However if the facts in the present case are considered as a whole it will be seen that there is no inconsistency in the matter. Simply, the new Schedule prescribed Sheriff's fees which may also be prescribed under the Sheriffs Act itself.

It was also argued that by amending the Sheriff's fees through the Courts Act what happened was in effect a repealing of a special Act namely the Sheriffs Act by a general Act, viz. the Courts Act. Learned Counsel said that this cannot be done for, in principle, special Acts cannot be repealed by general Acts. With respect we are unable to assent to the argument here. In our view the Sheriffs Act was not in any way repealed.

To conclude we find, as did the former Chief Justice in the Maunde case, that the effect of section 21(a) of the General Interpretation Act is that the said Item 23 of the 1977 Schedule must be taken to have also been made under section 47 of the Sheriffs Act and that the amendment of the said Schedule was therefore valid.

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The other aspect of the appeal relates to costs. Having found against the appellant the Court below proceeded to order the appellant to pay the costs of the application. Counsel for the appellant referred us to section 45 of the Sheriffs Act which provides that in no proceedings shall a court order all or any part of the costs thereof to be paid by the Sheriff unless it considers that the claim involved arose or was resisted, as the case may be, by reason of bad faith on the part of the Sheriff. That indeed is the rule and the rationale thereof is, in our view, not far to seek. The Sheriff normally goes out for executions on the initiative of one of the parties in an action. Looking at the facts of the present case there is absolutely nothing the Sheriff did which can be said to have been done in bad faith. The order of the lower Court on this aspect cannot therefore be supported.

In the result, the appeal succeeds and the decision of the Court below is reversed in its entirety.

The appellant is to have costs both here and below.

DELIVERED at Blantyre this 3rd day of October, 1988.

(Signed) _____

MAKUTA, C.J.

(Signed) _____

UNYOLO, J.A.

(Signed) _____

MBALAME, J.A.