IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.5 OF 1985
(Being Civil Cause No.330 of 1982)

BETWEEN:

OMAR OMARI MAUNDE.....APPELLANT

- and -

NATIONAL BANK OF MALAWI.....1ST RESPONDENT

- and -

D.R. CHINGUWO (MALE).....2ND RESPONDENT

- and -

M. MGOGO (MALE).....3RD RESPONDENT

Before: The Honourable the Chief Justice (Mr. F.L. Makuta)
The Honourable Mr. Justice Banda, J.A.
The Honourable Mr. Justice Unyolo, J.A.

Chizumila, counsel for the appellant
Msaka, counsel for the 1st respondent
Ng'ombe, counsel for the 2nd respondent
Nakanga, counsel for the 3rd respondent
Kadyakale, Law Clerk
Manda/Longwe, Court Reporters

JUDGMENT

Makuta, C.J.:

By his writ of summons the appellant claimed a total sum of K68,902,00 against the respondents. After considering the evidence adduced before him the learned Judge, Mr. Justice Jere, found against the appellant. It is from that judgment that the appeal arises.

Briefly, the facts are that the appellant was engaged in commercial farming and he was growing tobacco. The second and third respondents were employees of the first respondent. The appellant obtained a bank loan from the first respondent at its branch in Zomba. The appellant went to the bank from time to time to make drawings for his farming activities and whenever he went there he was attended to by the second and third respondents. It is alleged that when he went to

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the bank he was asked either by the second or the third respondent to sign blank cheques on which interest would be inserted after computation. He left such cheques with the second or third respondent but no interest was computed. It was pleaded that instead monies drawn on such cheques were stolen by the second or third respondents. Several cheques were drawn between October 1976 and June 1979. It was further pleaded that the two respondents used wrong cash flows and misappropriated monies by using correct cash flows. The difference between the wrong cash flows and the correct ones would be misappropriated by the two respondents. All the three respondents denied the allegations. The first respondent on its part counterclaimed in the sum of K67,019.12.

The grounds of appeal are as follows:

(a) The trial Judge erred in law in refusing to allow the appellant to amend his pleadings by substituting in paragraph 4 of the Statement of Claim the words 'October 1975' for the words 'October 1976';

(b) The trial Judge erred in law in finding that the 2nd and 3rd respondents were sued jointly when paragraph 18 of the Statement of Claim clearly stated that their liability was both and several and joint thereby showing that they were sued both jointly and severally;

(c) The trial Judge failed to properly and accurately assess the admissions by the 1st respondent as contained in the further and better particulars filed on 4th May 1984, and the implications of these admissions on the appellant's case;

(d) The trial Judge totally misunderstood the argument raised by the appellant regarding the cash book and erred in fact in finding that the same had been produced by the appellant; and

(e) The trial Judge failed or neglected to clearly and adequately assess the entire evidence as adduced during trial thereby rendering his decision against the weight of the evidence.

In arguing the first ground of appeal Mr. Chizumila stated that from the beginning of the trial the evidence of the appellant was talking about issues having commenced in October 1975. The cross examination of the appellant by all three counsel proceeded on the basis that the issues that were before the court started in October 1975. Therefore the amendment being sought was not introducing anything that had not been there before. In the circumstances none of the respondents was taken unawares by the application to amend. Mr. Chizumila submitted in very strong terms that if counsel had strong objections about allowing the amendment they should not have allowed evidence to be led on issues not pleaded; they had the right to object. But once the evidence is in it becomes the duty of the court and counsel that amendments are done in order to bring the issues to an end. In support of his submission he cited Levy & Co. Ltd v. George H. Hirst & Co. Ltd. (1943)

2 All E.R. 581. In this case new matters which were not pleaded were introduced into evidence during trial by the respondents. The appellant protested throughout against the introduction of evidence. As a result the court found against the appellant on the issues. On appeal the respondents sought to amend their pleadings to cover the new issues. The court of appeal allowed the amendment. But this was because on the particular facts of the case, having regard to what took place at the trial, the court came to the conclusion that, in the circumstances of the case, no real injustice would be done by allowing the amendment since the case had gone against the respondents anyway. In fact the appeal was allowed. We would like to repeat what the court of appeal said in this case. The court emphasized that where a substantial departure from the pleadings is desired to be made, it is the duty of the Judge to see that a proper application is made to him for leave to amend the pleadings at the trial otherwise serious injustice might occur. It was again emphasized that if this way of dealing with pleadings should occur in future the court will have no difficulty in keeping the side which had introduced new issues strictly to its pleadings and allowing it to argue the appeal on the basis of those pleadings and not on the new issue which they had endeavoured to introduce.

When considering the amendment in the instant case the learned Judge stated that courts will readily allow an amendment where to do so will not prejudice the other party and that such loss by the other party may be compensated by the appropriate monies. However, no amendment will be allowed where such amendment will protract the legal proceedings: see Curtz v. Spense. On this point Mr. Chizumila submitted, in effect, that protracting the legal proceedings should not be a bar to granting the amendment. He cited Application des Gaz SA v. Falks Veritas Ltd. (1974) 3 All E.R. 51. The defendants in this case sought an amendment to include a defence that the plaintiff should not be allowed to enforce a copyright which the plaintiff claimed because that would infringe articles 85 and 86 of the Treaty of Rome which have as their effect or object the prevention, restriction or distortion of competition within the common market. Lord Danning M.R. in delivering his judgment, stated at page 56: "so long as they insist on it, I do not think that we can refuse the amendments, provided always that they raise points which are fairly arguable". The Court of Appeal allowed the amendment since it was arguable on the facts alleged in the amendments that the articles would be infringed. The question, of course, in the present case is whether there are points which are fairly arguable. In Loutfi v. C. Czarnikow Ltd (1952) 2 All E.R. 823, it was held that unless there is very good ground and strong justification for so doing, the court should be reluctant to grant amendments of pleadings after the close of the case but before judgment even though it has been indicated in the course of the hearing that some amendment might be asked for. Such an amendment may be allowed where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will merely be incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties. Such an amendment may also be allowed where the subject of the amendment has been referred to by counsel in the opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence that it is a matter in controversy and the amendment will

enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts.

In Buckland v. Farmar & Moody (1979) WLR 221, the plaintiff, who had agreed to purchase property and had been served with notice to complete the purchase by December 1, 1973, assigned the benefit of the contract to a third party. By an independent agreement between the assignee and vendor, completion was postponed to January 28, 1974 but the assignee was unable to complete. In the Court of Appeal, Buckley L.J. stated thus when delivering his judgment:

> "In the court below, the issue upon which the plaintiffs seek to rely on this appeal, that is to say, that the essential character of time for the purpose of this contract had been waived as the result of events after December 1 - was opened and the evidence bearing on it was heard without protest by counsel for the defendants. Objection to the introduction of this issue was not taken until after all the evidence had been heard; it was taken in the course of the defendants' counsels' speech, which followed the closing of the evidence".

At page 228 the learned Lord Justice stated:

> "I think the position might well have been different if counsel had objected to the issue as soon as it was opened and before the evidence had all been heard".

Now what is the position in the instant case. Mr. Chizumila submitted that evidence had been led on the period October 1975 to October 1976 and there was no single objection from any counsel. They all cross-examined the appellant and the only time they objected was when the application for amendment was being made.

This court has had occasion to examine the court record. At page 851 Mr. Ng'ombe reminded the court that he had unsuccessfully attempted to object to irrelevant evidence being led. Cheques which were not relevant were being exhibited by the plaintiff and when objection was being made counsel for the plaintiff replied that they were there as examples. The other defence counsel agreed with Mr. Ng'ombe. When giving his ruling on this point the learned Judge stated:

> "I vividly remember counsel for the second defendant objecting to evidence being led for the period 1975. I regret I stopped Mr. Ng'ombe and overruled his submission that the evidence was irrelevant."

This, in our view, is clear indication that there was objection to the evidence being led for the period 1975. It is therefore not true to say that there was no objection.

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It is this court's view that when the objection was being made that should have prompted the plaintiff to re-examine his pleadings and take the necessary steps to amend them. As a matter of fact when the hearing had just started, at page 15, the court voiced caution to counsel. It stated thus:

> "The civil rules are very strict. Look at your State-ment of Claim, otherwise amend your Statement of Claim".

It is observed that the statement of claim had earlier on been amended in the same paragraph 4 in which amendment was being sought. We would have thought that a typing error would then have been clear. Further there was a reply to defence and counterclaim. Surely any typing error in the statement of claim would have been apparent and steps taken to correct it.

Order 20/5-8/6 of the Rules of the Supreme Court states that the guiding principle of cardinal importance on the question of amendment is that generally speaking such amendments ought to be made for the purpose of determining the real question in controversy between the parties to the proceedings or of correcting any defect or error in any proceedings. We have already dealt with the correction of error or defect. So far as determining the real question in the controversy is concerned, it is observed that the cheque which was in controversy in 1975 was exhibit 7, dated 24th November, 1975 in the sum of K300.00. Its number is $\frac{B}{F}$ 372202. But at pages 20 and 154 of the record the plaintiff admitted that he reeived the money. This means that there was no controversy and therefore no question to be determined. Hence there was no need for amendment.

On the second ground, paragraph 8 of the statement of claim avers that the total monies amounted to K22,975.00 and these were drawn by the second and third defendants. Paragraph 9 also avers that at all material times when the second and third defendants drew and misappropriated these monies they did so as employees of the first defendant. These assertions give the impression that the drawing and misappropriation of the monies was done by the second and third defendants jointly and not severally. The evidence adduced in court, however, showed that when the second defendant became manager in May 1975 he dealt with the account alone and the third defendant was assigned other duties. If there was any misappropriation, therefore, it was done severally and not jointly. Again paragraph 12 avers that sums of K7,242.00 and K19,185.00 were withdrawn by the second and third defendants in the 1977/78 and 1978/79 growing seasons respectively. However, the evidence adduced in court showed that the third defendant left the Zomba Branch of the National Bank in November 1976. He could therefore not be involved in the 1977/78 and 1978/79 seasons. Furthermore, paragraph 15 states that a sum of K14,500.00 was withdrawn and used by the second and/or the third defendant. This is in respect of a loan of K21,500.00 given to the plaintiff in the 1979/80 growing season. As already mentioned above the third defendant left in 1976. He could therefore not be involved in the 1979/80 growing season.

On the whole, the statement of claim avers that the second and third defendants were sued jointly whereas the evidence showed that they were sued severally. The learned Judge did not err in finding that the second and third defendants were sued jointly.

On the third ground Mr. Chizumila submitted that the appellant sought further and better particulars from the respondent to indicate what monies were received from the proceeds of tobacco by the appellant; what monies the bank lent to the appellant and the interest charged. The result was that the first respondent filed further and better particulars on 4th May 1984 showing monies received by the appellant, bank charges etc. The further and better particulars was marked Exhibit B. In court it was referred to as schedule B. It is therefore pertinent to mention that Exhibit B, or preferrably schedule B, is part of the pleadings. In the schedule there is a debit balance carried forward from the 1975/76 season to the 1976/77 season in the sum of K6,739.48. It was Mr. Chizumila's submissions that according to the schedule the appellant drew the sum of K14,422.54 in the 1976/77 season then there was a ledger fee of K16.00 and interest of K1,604.07. If the debit balance of K6,739.48 is added to these sums the total comes to K22,782.09. This, according to Mr. Chizumila, is the sum the plaintiff owed the first defendant in the 1976/77 season. On the payment side, in the 1976/77 season two sums of K24,132.57 and K5,775.51 were paid to the bank. The total comes to K29, 908.08. It was therefore argued by Mr. Chizumila that if the amount owed to the bank, namely K22,782.09, is subtracted from the amount paid into the bank, namely K29,908.08, there is a balance of K7,125.99 which should be taken as a credit to the plaintiff. This is correct. The credit balance of K1,350.48 shown on the schedule cannot therefore stand.

Further examination of the schedule indicates that there is a figure of K8,018 shown as a frozen loan account in the 1976/77 season. Mr. Chizumila submitted that there is no evidence to back up this. Be that as it may, this frozen loan account, whether it was given or not, means that the plaintiff did not use it. He cannot therefore be liable to pay it. That being the case it follows that interest of K1,168.51 charged on it should not be there at all. This also means that the balance of K3,501.04 shown on the schedule cannot stand. The overall result is that drawings are reduced to K105,456.29. It should be pointed out that the total sum of K133,564.29 shown on the schedule in the drawings column is wrong. It should read K113,474.29 before the frozen loan account of K8,018.00 is deducted.

We now turn to the fourth ground or ground (d). In arguing that ground Mr. Chizumila did suggest to the court that the cash book is not a reliable document. It should not be relied upon because it is not an original document since it simply records what has been recorded in other documents. If these documents are wrong then the cash book will record wrong information; and for one to find out whether the recorded information is correct or not one must look at the original document, be it an invoice, a cheque, a ledger card, a receipt etc. Mr. Chizumila argued in effect that for the learned Judge to accept the cash book recording as correct he should have examined the original document first. Because the learned trial Judge did not do that he came to a wrong conclusion that the cash book was properly recorded.

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A cash book is one of the books of accounts and there is no reason to assume that what is recorded there is not properly done. In the instant case the cash book being talked about belonged to the appellant. It was his exhibit and he produced it. We are therefore surprised that the appellant asserts that the learned Judge erred in finding that the same had been produced by the appellant. Looking at this ground of appeal one wonders what is intended to be achieved by it. It is difficult to understand why the appellant is casting some doubt on his own document. The ground is not substantiated. It fails.

On the fifth ground Mr. Chizumila argued, in effect, that the learned trial Judge did not fully address himself to the evidence of the plaintiff. In particular he urged the court to bear in mind that if the cheques in question had been written by the plaintiff this case would not have arisen. It arose because the second and third respondents decided to write cheques for a person capable of writing them. The following exhibits were cited:

Exhibit 11, Cheque for K1000, dated 24th June 1977
Exhibit 13, Cheque for K1200, dated 17th March 1977
Exhibit 15, Cheque for K550, dated 30th April 1977
Exhibit 16, Cheque for K890, dated 22nd December 1977
Exhibit 19, Cheque for K860, dated 24th May 1979
Exhibit 22, Cheque for K1700, dated 21st January 1978
Exhibit 23, Cheque for K1747.16, dated 31st July 1978
Exhibit 28, Cheque for K860, dated 7th April 1979
Exhibit 31, Cheque for K600, dated 18th October 1977
Exhibit 33, Cheque for K1950, dated 29th November 1977
Exhibit 34, Cheque for K905, dated 3rd November 1977
Exhibit 36, Cheque for K1000, dated 30th August 1977
Exhibit 39, Cheque for K500, dated 14th September 1977
Exhibit 45, Cheque for 750, dated 15th April 1978
Exhibit 48, Cheque for K1800, dated 10th March 1978
Exhibit 50, Cheque for K150, dated 11th May 1978

The total amount of these cheques comes to K16,426.16. In respect of exhibit 11 the plaintiff stated at page 184 of the record that he did not receive the money. But at page 322 he contradicted himself and stated that the received the money and that it did not form part of his claim. In respect of exhibits 13, 15, 23, 28, 33, 36, 39 and 50 the plaintiff stated that he did not know who wrote and cashed the cheques. He also did not know who used the money. It is also significant to point out that exhibit 13 was written and cashed when the second respondent was on training in the United Kingdom. It is inconceivable therefore that the second respondent could have been involved. Of course the third respondent had already left the Zomba Branch of the National Bank at the time exhibit 13 was written and cashed.

It is observed that after his letter of complaint dated 1st December, 1977 the appellant continued, if his story is true, to leave cheques, on the alleged instruction of the second and third respondents, for the purpose of inserting interest on them. We find this assertion untenable especially after being advised, according to him, by other people that this is not the practice of the Bank. One would have expected the appellant to have stopped leaving any cheques at the bank for the intended

purpose. It is further observed that all the cheques bear the signature of the appellant. One would assume in such circumstances that the appellant knew why he was signing and what he was signing for and that he used the money. It is this court's view that merely writing the amount of the cheque and the name of the payee without more can be sufficient evidence that the person who wrote the amount and the name of the payee stole the money. In the light of these facts it is our opinion that the trial Judge adequately assessed the entire evidence adduced during the trial. The fifth ground also fails.

We now turn to the counterclaim. It would appear that the counterclaim was based on the total balance of K57,019.12 as shown on the schedule. We have already found above that the balances of K1350.48 and K3501.04 cannot stand. The total balance is now K52,171.72. From this figure the frozen loan account of K8,018.00 will be deducted because, in our view, the appellant cannot be held liable since he did not draw it. The new figure will therefore be K54,153.72. We would like to mention that there was no appeal on the counterclaim. It must be borne in mind that a counterclaim is a separate and distinct claim and if a party is not happy about any finding on it he must appeal specifically. Failure to appeal specifically is an indication that parties are happy with the finding. In the instant case the appellant is liable to pay K54,153.72.

On costs the appellant has succeeded on the third ground. The respondents will therefore have costs on the grounds on which they have succeeded and the appellant will have costs on the third ground.

DELIVERED at Blantyre this 6th day of November 1989.

(Signed) _____

MAKUTA, C.J.

(Signed) _____

BANDA, J.A.

(Signed) _____

UNYOLO, J.A.