IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL NO. 5 OF 1988
(Being Civl Cause No. 710 of 1988)

BETWEEN:

WIYULE BROTHERS ..... APPELLANT

- AND -

STANSFIELD MOTORS LIMITED ..... RESPONDENT

Before: The Honourable the Chief Justice, Mr. Justice Makuta
The Honourable Mr. Justice Banda. J.A.
The Honourable Mr. Justice Mkandawire, AG. J.A.

Chirwa, Counsel for the Appellants
Nakanga, Counsel for the Respondents
Namvenya/Manondo, Court Clerks
Longwe, Court Reporter

J U D G M E N T

Mkandawire, AG. J.A.

The substantive issues of this case are yet to be decided. This appeal arises from the ruling of the learned Mr. Justice Unyolo, dated 23rd February, 1988, in which he ordered that the interlocutory injunction granted to the appellant on 4th December, 1987, is to continue up to the trial of the action on condition that the appellant pays into court the sum of K3,588.31 which the respondent claimed the appellant was owing. It was further ordered that costs be costs in the cause.

By a writ of summons dated 3rd December, 1987, the appellant brought an action against the respondent for the repayment of the excess price paid by the appellant on the purchase of the Fuso Truck Registration No. BA 2828 and for the wrongful taking and continued detention of the said truck by the respondent and for an injunction to restrain the respondent by itself, its agents or servants or whosoever otherwise from seizing and taking possession of or repeating the acts of seizing and taking possession and detention of

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the truck. Particulars of the action were set out in detail in a statement of claim dated 11th December, 1987. On 3rd December, 1987, the appellant took out an ex-parte application for an interlocutory injunction to restrain the respondent from seizing the truck. That application was heard the following day on 4th December, 1987, and an interlocutory injunction was granted. It is this interlocutory injunction that the learned Judge ordered on an interpartes application, that it should continue until the conclusion of the action.

The appellant has filed three grounds of appeal as follows:

(a) The learned Judge failed to exercise his discretion on costs or disregarded fixed principles in awarding costs incidental to the contested motion for injunction.

(b) The learned Judge took into consideration irrelevant matters and erred in principle when he imposed a condition that K3,588.81 be paid by the appellant.

(c) The learned Judge was wrong in principle in ordering the sum of K3,588.81 to be paid into court when the same has not been counter-claimed.

We will start with the first ground. Mr. Chirwa who acts for the appellant submitted that the learned Judge erred in ordering that costs be in the cause. He said that as a successful party costs should have been awarded to the appellant in the cause. He referred to Order 29/1/10 of the Rules of the Supreme Court. He then went on to say that this was an important matter to the appellant as he stood to lose the truck if the application failed. This was an application which was vigorously opposed so that the appellant should have been awarded the costs. On the other hand, Mr. Nakanga who acts for the respondent argues that the learned Judge's order making costs to be costs in the cause was proper. He says that costs is a matter of discretion for the court and in this case that discretion was properly exercised especially that he had indicated to the appellant that the truck would not in fact be seized.

It is an established principle that the awarding of costs is a matter of discretion for the court. However, that discretion must be exercised judicially according to reason and justice - see Orders 62/2/9 and 62/2/10 of the Rules of the Supreme Court.

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Order 62/9 of the Rules of the Supreme Court lists matters which a court must take into account in exercising that discretion. Mr. Chirwa relied on Order 29/1/10 of the Rules of the Supreme Court which provides:

> "It has for many years, been the normal practice in the Chancery Division for a successful plaintiff granted an interlocutory injunction to be granted his costs in the cause and for the successful defendant to be granted his costs in the cause. But the rationale of that practice is perhaps not clear and the courts are showing greater willingness to depart from it ....."

It is unfortunate that we have not been able to find the case cited thereunder. With respect, this provision does not take away the court's discretion and Mr. Chirwa conceded that there are no fixed principles which the learned Judge disregarded. Mr. Chirwa was at pains to try and show how the learned Judge had failed to properly exercise his discretion. Mr. Nakanga contends that the learned Judge had properly exercised his discretion especially that he had made it clear that the truck would not be seized. Indeed, if Mr. Nakanga had made such an undertaking then the summons to continue the interlocutory injunction was of no real purpose and the appellant cannot now be asking for costs. We, therefore, agree with Mr. Nakanga that in making the costs of the application as part of the general costs of the action the learned Judge had properly exercised his discretion. Our view is strengthened from an analogy that can be drawn from Order 62/9/5 of the Rules of the Supreme Court. With Mr. Nakanga's undertaking not to seize the truck for a second time, the fears of the appellants were, therefore, uncalled for and yet they went ahead and prosecuted the application. In the circumstances, we agree that the proper order for costs was costs in cause. This ground of appeal therefore fails.

We shall consider grounds 2 and 3 together since Mr. Chirwa argued them together. It is his contention that the learned Judge was wrong in principle in ordering that the appellant should pay the sum of K3,588.81 in court as there is no legal basis on which it was grounded. He goes on to say that this amount was not counterclaimed and was not even pleaded. It is just mentioned in the defence. Mr. Chirwa relies on the case of Make Mkwawira vs. Press (Agencies) Ltd., being M.S.C.A. Civil Appeal No. 7/78 (unreported) in which their Lordships said:

> "In our view, the Judgment was given on facts which were not pleaded and in respect of a cause of action not before the Court. It cannot stand. We agree with the trial Judge that it is open to the Respondent to immediately institute fresh proceedings claiming for goods sold and delivered, and it seems unlikely that there could be any defence to such a claim. While it is the duty of a court to avoid unnecesaary litigation, we find it impossible to allow judgment to stand, tempted as we are to allow it to stand, which was given on facts which were not pleaded and in respect of a cause of action not before the Court."

Mr. Nakanga sought to distinguish that case on the basis that in the instant case there is no judgement.

We agree with Mr. Nakanga. In the Mkwawira case their Lordships were faced with a final judgment and the bone of contention was that that judgment was given on facts which were not pleaded. That is not the case here. We are not faced with a final judgement. The learned Judge did not enter any final judgment, he did not even make an award. The question of pleadings does not therefore arise and the case relied upon by the appellant has no relevance whatsoever to this matter. What we have before us is just a conditional order. All the learned Judge did was to grant the interlocutory injunction the appellant applied for on condition that the appellant pays the sum of K3,588.81 in court.

The appellant's contention is that there was no legal basis for making such an order. The question that arises, therefore, is, did the learned Judge have the power to make such an order? In the first place the power to grant or not to grant an interlocutory injunction is discretionary. See Order 29/1/3 of the Rules of the Supreme Court. However, as already mentioned earlier in this judgment, this discretion must be exercised judicially. Secondly, having decided to grant the interlocutory injunction, it is again in the discretion of the court whether to grant it unconditionally or conditionally - see Order 29/1/1 of the Rules of the Supreme Court. It was, therefore, within the discretionary powers of the learned Judge to make the conditional interlocutory injunction. We cannot interfere with the exercise of such discretionary powers unless it can be shown to us that the learned Judge was wrong in principle. This the appellant has not done. We find that the learned Judge had properly exercised his discretion in granting the order. This ground of appeal must also fail. In the result the appeal is dismissed in its entirety with costs to the respondent.

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PRONOUNCED in open Court this 6th day of November, 1989, at Blantyre.

(Signed) _____

MAKUTA, C.J.

(Signed) _____

BANDA, J.A.

(Signed) _____

MKANDAWIRE, AG. J.A.