

IN THE MALAWI SUPREME COURT OF APPEAL, BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 9 OF 1987

BETWEEN:

J.M. BARNETT & CO. LTD. APPELLANT

- and -

UNIVERSAL SHIPPING CO. LTD. RESPONDENT

Before: The Honourable Mr. Justice Unyolo, J.A.
The Honourable Mr. Justice Kalaile, J.A.
The Honourable Mr. Ag. Justice Tambala, Ag. J.A.
Osman, Counsel for the Appellant
Mhango, Counsel for the Respondent
Manda, Court Reporter
Kadyakale, Official Interpreter

JUDGMENT

Unyolo, J.A.

This is an appeal from a ruling handed down by Mtegha, J. staying proceedings in this case for being an abuse of the process of the court.

The facts are these : by its writ of summons and statement of claim filed therewith, the appellant on 15th May, 1984, commenced an action against the respondent claiming a total sum of K55,889.50 made up as follows:

- (a) The sum of K44,007.74 being money had and received by the respondent for and to the use of the appellant; and
- (b) The sum of K11,881.76 representing 27% devaluation of the Malawi Kwacha and being the amount by which the said sum of K44,007.74 was reduced thereby.

The appellant also claimed interest at the rate of 13% per annum on the said sum of K44,007.74 from 1st January, 1980, until payment or judgment. Civil Cause No. 202 of 1984, hereinafter referred to as "Cause 202", refers.

On 15th October, 1984, the appellant filed an application to amend the said writ and statement of claim claiming thereby a total sum of K62,053.06. It is necessary for reasons which will be apparent later to set out the proposed amended statement of claim in full. It reads as follows:

- "1. The plaintiff is a limited liability company incorporated in the Republic of Mozambique and carrying on business as Clearing and Forwarding Agents as the Port of Beira and the Defendant is also a limited liability company incorporated in the Republic of Malawi and carrying on business in the said Republic of Malawi.
2. By agreement between the Plaintiff and Defendant, the Plaintiff agreed to handle and clear goods from and to Malawi passing through the Port of Beira belonging to the Defendant and the Defendant's customers.
3. It was a term of the said agreement that the Plaintiff would charge a fee for its services in addition to receiving its disbursements and in course of carrying and rendering those services to the Defendant and its customers the sum of MK44,007.74 became due from the Defendant to the Plaintiff, full particulars of which have already been supplied to the Defendant.
4. The Defendant received some monies from the Plaintiff's customers in Malawi amounting to MK6,163.56 for and on behalf of the Plaintiff which sum the Defendant has to date not forwarded to the Plaintiff.
5. The Defendant by a letter dated 30th August, 1983, to which was attached a statement of balances between the Defendant and the Plaintiff in which the Defendant admitted owing a total sum of K31,995.94.
6. The Malawi Kwacha was devalued to the extent of 27% and the Plaintiff claims the equivalent to the said devaluation on the amount claimed of MK44,007.94 amounting to MK11,881.76.
7. The Plaintiff's total claim against the Defendant is for the sum of K62,053.06 and for costs of this action."

After hearing counsel, the Registrar disallowed the amendments under paragraphs 2 and 3 saying:

"It appears to me that although the amount of K44,007.74 is the same, the cause of action being substituted in the proposed amendment is substantially different. Such an amendment clearly offends O.20/5 R.S.C. I therefore cannot allow paragraphs 2 and 3."

He also disallowed the amendments sought under paragraphs 5 and 7, observing:

"I really do not see the point in putting in paragraph 5 in the statement of claim for it merely states that there was an admission in the sum of K31,995.94. Since I have disallowed paragraphs 2 and 3, paragraph 7 cannot stand."

This, therefore, left the appellant with only paragraphs 1, 4, and 6 of the proposed amended statement of claim and the appellant was given 14 days from the date of the Registrar's Order, 15th November, 1984, within which to file the amended statement of claim, as allowed. The learned Registrar was, in our view, clearly wrong in the matter. There were good and strong reasons in support of the amendments sought, all of them. Indeed it appears to us that the appellant would have come up with an inconsistent and bizarre statement of claim if he had brought one based on only the three paragraphs, 1, 4 and 6, considering that these paragraphs, especially paragraph 6, only made sense when pleaded in conjunction with the disallowed paragraphs 2 and 3 and considering further that the Registrar said nothing about the writ itself, which the appellant also sought to amend. We are aware that the appellant did not appeal against the order and we are making the observations here only in passing.

Next, the appellant filed, on 23rd November, 1984, an amended statement of claim purportedly pursuant to the Registrar's order above-mentioned containing only one paragraph couched as follows:

"The Plaintiff's claim is against the Defendant for the sum of K6,163.56 being money received by the Defendant from Plaintiff's customers for and on behalf of the Plaintiff and as acknowledged by the Defendant on a statement attached to a letter dated 30th August, 1983, and for costs of this action."

There are two affidavits sworn by Mr. Chizumila and Mr. Nyirenda, counsel then in the employ of the parties' legal practitioners namely, Messrs A.R. Osman and Company and Messrs Bazuka and Company, respectively. These are the counsel who dealt with the cases at the material time but both have since ceased to work for the two firms. Mr. Chizumila is presently with Messrs Lilley, Wills and Company and Mr. Nyirenda is now on his own. It is common case in the

two affidavits that counsel thought that the parties were, by the Registrar's said Order, placed in a dilemma and after discussing the matter counsel agreed that the appellant should withdraw the claim of K44,007.74, disallowed under paragraph 3 of the proposed amended statement of claim and only proceed with the claim of K6,163.56 under paragraph 4. The facts there show that counsel agreed that in so withdrawing the appellant should pay costs to the respondent in the sum of K500, which sum was actually paid. Mr. Chizumila then filed the amended statement of claim in terms of the agreement so reached and in due course a defence was filed by Mr. Nyirenda and served upon the appellant's legal practitioners. That was in December, 1984.

The matter did not, however, end there. By its writ of summons dated 3rd December, 1984, and statement of claim filed therewith the appellant commenced another action against the respondent in Civil Cause No. 501 of 1984, hereinafter referred to as "the present case," claiming the very sum of K44,007.74 earlier claimed in Cause 202 which claim, as just indicated above, was in the end withdrawn. The writ was duly served on the respondent, who put in a defence denying owing the sum claimed or at all and counterclaimed the sum of K20,606.69 from the appellant, a claim denied by the appellant. Unlike Cause 202, the present case progressed and was set down for trial on 23rd March, 1987. The matter came before Mtegha, J. on that date. All the appellant's witnesses came when the respondent's counsel, this time Mr. Mhango, moved that the action be dismissed for being an abuse of the process of the court, in that the present case was virtually the same as that in Cause 202, which was still pending. After hearing counsel on both sides and reviewing the argument put up, the learned Judge found for the respondent and proceeded to make an order that the proceedings in the present case be stayed until the proceedings in Cause 202 were concluded or withdrawn. That is the order against which the appellant appeals to this Court.

Incidentally, we did not say what is the present position regarding Cause 202. We only said that the respondent served a defence to the amended statement of claim filed by consent in December, 1984, on 4th December, 1984, to be precise. On 5th May, 1987, Mr. Mhango for the respondent (Mr. Nyirenda had left then) filed an application that the amended statement of claim should be disallowed on the grounds that the same was not made in accordance with the Registrar's order above-mentioned. The application, again, came before the Registrar, who, after hearing counsel on both sides in argument, allowed the application on 12th February, 1988, and disallowed the said amended statement of claim in its entirety. The appellant quickly appealed against that order, but to-date the appeal has not yet been heard.

Such are the facts. We have laboured to recount them in extenso in order to put the matter in its proper perspective. Three grounds of appeal were filed by the appellant. These are:

- "(i) The Trial Judge erred in law in finding and concluding that the claim of K44,007.76 is still subsisting in Civil Cause No. 202 of 1984 when an amended statement of claim had been duly filed, accepted and a defence filed in return.
- (ii) The Trial Judge erred in law in staying the proceedings in Civil Cause No. 501 of 1984 when no such order had been applied for and when the causes of action and issues in the two Civil Causes Nos. 202 and 501 of 1984 were separate and distinct.
- (iii) The Trial Judge had no cause in law to make the order he made as any exercise of a Court's inherent jurisdiction should be to speed up proceedings and not prejudice the parties which was the case in the order appealed against, i.e. the Plaintiff has been seriously prejudiced by the order of the Trial Judge."

It is also to be observed that the respondent filed a notice urging this Court to vary the ruling of the court below by ordering that the proceedings herein should be dismissed and not just stayed. Two grounds were submitted and these are:

- "(i) Having found that the claim for K44,007.74 still subsisted and continues in Civil Cause 202 of 1984 the trial Judge should have dismissed the subsequent proceedings in Civil Cause 501 of 1984 and not just stayed the same, being an abuse of the process of the court.
- (ii) Having found that the commencement of proceedings in Civil Cause No. 501 of 1984 was a circumvention of the Registrar's ruling in respect of identical issues to those that had been decided against the appellant in Civil Cause No. 202 of 1984, the trial Judge should have dismissed Cause No. 501 of 1984 as an abuse of the process of the court."

We now revert to the appellant's appeal and we will deal with the first ground wherein it is contended that the court below erred in finding the appellant's claim for K44,007.74 was still subsisting in Cause 202 when an amended statement of claim had been duly filed, accepted and a defence served thereon. There is no doubt, in our minds, that the amended statement of claim filed by the appellant on 23rd November, 1984, albeit with the consent of counsel for the respondent was, strictly speaking, not amended in accordance with the order made thereon by the Registrar. True, as we have already indicated, the Registrar's order produced a bizarre

situation but all the same it was incumbent upon the appellant to take appropriate action and get matters straightened out. This being the case, the respondent was entitled to apply to have the same disallowed upon the authority of O.20/9/1 of the Rules of Supreme Court and the effect of the Registrar's Order, having disallowed the gamut of amendments sought by the appellant, was to leave the appellant with the original statement of claim in the matter; back to square one, so to say. And as already noted the claim there was for the sum of K55,889.50 made up of (a) The sum of K44,007.74 being money had and received by the respondent for and to the use of the appellant; and (b) The sum of K11,881.76 representing 27% devaluation and its effect on the said sum of K44,007.74. Thus on these facts the appellant's claim of K44,007.74 was at the time the said order was made, at that point in time, clearly restored.

It is however important to bear in mind, as already indicated, that the amended statement of claim herein was filed by consent on 23rd November, 1984, and the respondent served its defence thereto that very year. The application to disallow the said amended statement of claim was filed only on 1st May, 1987, and the application was heard on 17th February, 1988, and the ruling was given only on 12th April, 1988. It is to be noted, however, that the ruling of the court below now under appeal was given on 26th March, 1987. Clearly, this was before the amended statement of claim was disallowed. In our judgment until the respondent moved to have the said amended statement of claim disallowed and until the same was actually disallowed (on 12th April, 1988), the said amended statement of claim was the statement of claim on record. In other words, by the time the learned Judge in the court below handed down his ruling under appeal, the appellant's claim on record in Cause 202 was for K6,163.56 only. In other words, the claim for K44,007.74 did not subsist at that point in time. We are, therefore, unable on these facts to support the finding of the court below on this aspect.

There is one other matter to which we think we should refer on this aspect if only to do justice to counsel as a lot was said by them in argument. This refers to whether pleadings can be amended by agreement between parties. Under O.20/12 of the Rules of the Supreme Court any pleading in a cause or matter in the Chancery Division in England may be amended by a written agreement between the parties. Observably the rule herein is presently limited to pleadings in the Chancery Division. However, the policy underlining the same is said to be of general application in recognition of the principle of "party control." See O.20/12/1. It is common knowledge that we do not have Divisions in this jurisdiction. For our part it seems that this is a good rule. Indeed it is the parties themselves who must decide what issues to bring before the court. We would therefore find that parties may by written agreement amend their pleadings by consent so long as the relevant procedures are followed.

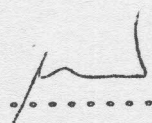
We now turn to the second and third grounds of appeal which we will deal with together. The first observation to be made is that in our view the causes of action and issues in Cause 202 and the present case (Cause 501) are different. As indicated above the claim of K44,007.74 in the previous case is for money had and received by the respondent from the appellant's debtors and as the appellant's agents for and to the use of the appellants, whereas the K44,007.74 claimed in the present case is for money due for services rendered by the appellant to the respondent and its customers. We have considered the several cases cited to us by Mr. Mhango on this aspect but remain of the firm view, with respect, that the two cases here involve different causes of action and issues and different elements have in law necessarily to be proved in each case if the claim is to succeed. We are consequently unable to agree that there was an abuse of the process of the court in this matter.

But even assuming that Mr. Mhango is right on this point it is important to bear in mind that the power to dismiss or stay proceedings for being an abuse of the process of the court is discretionary. Order 18/19 of the Rules of Supreme Court is clear on this. Of course such discretion must be exercised judicially, that is according to rules of reason and justice. The following matters are pertinent in the present case. First, it is to be observed that the appellant commenced the action in the present case (Cause 501) on 20th November, 1984, and a defence cum counterclaim was served by the respondent on 18th December, 1984. There was a reply filed on 27th December, 1984. The matter proceeded to a summons for directions and then it was set down for hearing on 23rd March, 1987. As already indicated, it was only then on that date that the application to dismiss the proceedings was made. This was almost two and half years after the proceedings had been instituted and then witnesses had been summoned and were before the court. Some of those had come from outside Malawi. Meanwhile, Cause 202 was still lying in limbo a long, long way before it would be set down for hearing. Again, it is significant that the unhappy events in this case, as we have already observed several times over, were influenced by the clearly erroneous order of the Registrar.

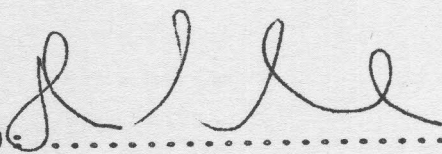
Considering all these facts, it is our firm view that this was a proper case in which the court's discretion should have been exercised in favour of proceeding to hear the present case in preference to Cause 202.

It is on the sum of these considerations that we find that the appeal must be allowed. The order by the court below is set aside and we order that the appellant be at liberty to proceed with the hearing of the present case, Cause 501. The respondent's appeal automatically fails and is dismissed. The appellant is to have the costs of the appeal.

DELIVERED at Blantyre this 12th day of May, 1989.

(Signed): 

UNYOLO, J.A.

(Signed): 

KALAILE, J.A.

(Signed): 

TAMBALA, J.A.