Chatika J.

file

IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

M.S.C.A. CIVIL APPEAL NO. 26 OF 1988
(Being Civil Cause No. 221 of 1985)

BETWEEN: K. N. PINTO ..... APPELLANT

- and -

PRESS TRANSPORT (1975) LTD ..... RESPONDENT

CORAM : The Hon. Mr. Justice Unyolo, J.A.
The Hon. Mr. Justice Mkandawire, J.A.
The Hon. Mr. Justice Tambala, J.A.
Appellant, present, represented by Mhango
For the Respondent, Jussab
Court Reporters, Longwe/Maore
Official Interpreters, Chilongo/Gomani

J U D G M E N T

Tambala, J.A.

This is an appeal against the decision of the High Court which, on 13th September, 1988, entered judgment for a sum of K908.55 in favour of the respondents and awarded them costs on the subordinate court scale. Mr. P.M. Pinto, the appellant died about one year after the judgment of the High Court was pronounced. This appeal is pursued by the Administrator of the appellant's estate.

The respondents are a limited liability company engaged in the business of transportation of goods. In or before 1983 they entered into a contract with the Import and Export Company of Malawi to uplift sugar from SUCOMA in the Lower Shire to various Chipiku depots throughout the country. At about the same time they had another contract with Hardware and General Dealers Ltd to carry goods and deliver them to various places in the country as directed by them. The respondents' fleet capacity was not adequate to enable them to discharge satisfactorily their obligations under the contracts. They were compelled to sub-contract some work. They sub-contracted the appellant who was running transport business under the name of Ndilekeni Transport to carry the sugar from SUCOMA to various Chipiku depots.

The appellant did not have sufficient resources to perform his duties under the sub-contract. It was therefore agreed between them that the respondents would supply fuel to the appellant's truck. The cost of the fuel would be deducted from the payment due to the appellant under the sub-contract.

The respondents arranged with OILCOM to pay in advance for their estimated fuel requirements each month. At the end of the

month OILCOM would send a statement to the respondents showing the balance of the fuel and the money required to replenish the stock. As a result of this arrangement the respondents would draw fuel from any OILCOM fuel station by means of an L.P.O. is sued by them.

It was agreed between the parties to the sub-contract that before making a trip the appellant would obtain from the office of the respondents an L.P.O. for the supply of fuel. He would take the L.P.O. to any OILCOM fuel station where he would obtain diesel which would be filled in his truck. OILCOM would eventually send an invoice to the respondents showing the quan tity and value of the diesel supplied to the appellant. Upon re ceipt of the invoice the respondents would issue a debit note to the appellant. This document would show the value of fuel which would eventually be deducted from the payments due to the appel- lant.

The evidence on record shows that the appellant made few trips carrying sugar on behalf of the respondents. He received payment on those trips and the respondents were able to deduct the value of fuel supplied to him. Then the appellant, without the knowledge of the respondents, stopped transporting the sugar; that was after he had collected a number of L.P.O.s from the office of the respondents on the pretext that he would use the fuel supplied to him in performing his duties under the sub- con- tract.

The respondents began receiving complaints from Import and Export Company Ltd that their sugar was not being carried from SUCOMA to Chipiku depots. They, however, continued to receive invoices from OILCOM fuel stations showing that diesel was supplied to the appellant using their L.P.O.s. The appellant made no claims for payment for carrying the sugar. There was, therefore, no payment from which the value of the fuel shown on the subsequent invoices could be deducted. The value of the fuel shown on the invoices which OILCOM sent to the respondents after the appellant had stopped transporting the sugar came to K4826.01.

The appellant testified before the lower court that his dealings with the respondents were conducted through the African Businessmen Association, commonly known as "A.B.A.". The respondents made arrangement with the A.B.A. that its members should carry goods on their behalf. He conceded, however, that he was engaged by the respondents as a sub-contractor. He said that he would report with his truck to the premises of A.B.A. where he would give him a waybill which he took to the office of the respondents. He would meet Mr. Ndutaya in the accounts office. He would show him the waybill. Mr. Ndutaya would then give the appellant an L.P.O. to purchase fuel from any OILCOM filling station.

It was the appellant's evidence in the court below that after filling his truck with diesel he would go to carry the goods and deliver them to the required destination. The person receiving the goods would sign the waybill. He would take the signed waybill to Mr. Ndutaya to process payment. He would then receive his money from a paymaster who would ensure that the cost of fuel supplied to him was deducted from the payment. He also received a copy of a payment voucher in respect of every payment which he received. ..It was therefore the contention of the appellant that he used the fuel which was supplied to him by the respondents in carrying the sugar and delivering it to the required destinations and that the cost of such fuel was deducted from the payments which he received.

It was further the appellants' story before the trial judge that he subsequently received a letter from Messrs Sacranie, Gow and Company demanding a sum of K5,563.61 being the value of fuel supplied to him. He took the letter and copies of the payment vouchers to the paymaster at the respondents' office. During his discussion with the paymaster he realised that he was being overcharged for fuel. He was being debited with retail prices instead of the agreed wholesale prices. The paymaster agreed to issue him a credit note for the amount in excess of the wholesale prices. He was asked to leave the letter and the payment vouchers. He left the documents with the paymaster.

The trial judge, after carefully reviewing the evidence before him came to the conclusion that after the appellant took the affected L.P.O.s from the respondents' office and drew fuel at Oilcom filling stations he did not make the trips required under the sub-contract. The learned Judge observed that the appellant failed to produce the payment vouchers which could show that the respondents deducted the value of the fuel from the money paid to him. The learned Judge rejected the appellants' story that he left the payment vouchers with the respondents' paymaster who was subsequently dismissed.

After carefully examining the total evidence which was adduced before the trial Judge we have come to the same conclusion that after he drew fuel worth K4,826.01 from Oilcom Filling Stations using the repondents' L.P.O.s the appellant did not make the trips required under the terms of the sub-contract. He used such fuel for other purposes totally unconnected with his obligations under the agreement between himself and the respondents.

The appellant successfully raised the defence of illegality of contract in the Court below. Regulation 5 - (1) of Preservation of Public Security (Conservation of Motor Fuel) Regulations prohibits the sale or purchase of fuel on credit from a fuel station. The learned Judge accepted his contention that when he drew fuel at the fuel stations using the L.P.O.s, the respondents, through Oilcom acting as their agent, sold diesel to him on credit. He rejected the respondents' argument that the purchase of the diesel did not take place at fuel stations but at

the respondents' premises when the L.P.O.s were issued to the appellant. After careful consideration of the facts and counsels' arguments which were presented in the Court below we have no good reason to disagree with the learned Judge. We find no fault with the conclusion which he reached on that matter. We are satisfied that the appellants' defence based on the illegality of the contract between the parties was rightly upheld.

The appellant, in the court below, produced delivery note No. 9156 showing that 100 litres of diesel worth K81.50 was supplied to him. He also produced delivery note No. 9183 showing 100 litres of diesel worth K122.25. He said that he purchased on credit the diesel shown on the two documents from the respondents' depot. He further produced two cash sales: No. 112253 and No.034014 issued by Mobil Oil and Oilcom respectively. They each show 400 litres of diesel worth K352.40. The total value of fuel shown on the four documents is K908.55.

After upholding the defence raised by the appellant the learned Judge proceeded to enter judgment in favour of the respondents for the sum of K908.55. The learned Judge grossly erred here. The four documents tendered by the appellant did not form part of the case for the respondents. These documents were produced for the purpose of showing the obvious fact that wholesale prices for fuel were lower than the retail prices. Again the two cash sales should have made it clear to the learned Judge that the appellant used his own cash amounting to K704.80 to purchase 800 litres of diesel. There was no basis for requiring the appellant to pay the K908.55. Having upheld the appellant's defence based on the illegality of the contract between himself and the respondents the learned Judge should have simply dismissed the plaintiff's action in its entirety.

We would therefore allow the appeal. The judgment of the lower court requiring the appellant to pay the respondents K908.55 is set aside.

We must now deal with the issue of costs relating to this appeal and the proceedings in the Court below. Counsel for the respondents contended that the appellant should not be awarded the costs of this appeal because the issue upon which this appeal turns was not raised in the Court below. He cited the case of Simpson v Crowle (1921) 3 K.B. 243 as supporting the proposition that where an appeal succeeds on a ground which was not raised in the trial court the appellate court may deny the successful party the costs of the appeal. The case of Simpson v Crowle "supra" does indeed support that proposition. In the present appeal the trial court erroneously entered judgment in favour of the respondent. The appellant could not raise the issue of a wrong judgment before it was pronounced by the court. The only forum which afforded him an opportunity to attack the learned Judges' Judgment is this Court. We take the view that the case cited by Counsel is of no relevance here. Counsel's contention, however, compelled us to consider whether there are present in this appeal grounds upon which a discretion to deprive a successful appellant

of his costs could be exercised.

The general rule is that costs are awarded in the courts' discretion. That discretion is not however absolute. It is fettered by some judicial considerations. Normally costs follow the event. A successful litigant is "prima facie" entitled to the costs of the litigation. It also follows that a party to an appeal who is successful is generally entitled to expect the costs of the appeal paid to him. Perhaps this is a major factor limiting the courts' discretion in awarding costs. The remarks of LORD STERNDALE M.R. in the case of Ritter v Godfrey (1920) 2 K.B. 47 would seem pertinent. His Lordship at page 52 said:-

> "But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore, there must be some grounds for its exercise for a discretion exercised on no grounds cannot be judicial."

In the present case the appellant drew fuel worth K4826.01 which the respondents had paid for in advance. He used it for his own purposes quite contrary to the terms of his agreement with the respondents. The latter will lose this money com pletely. It would seem to us that the respondent honestly be lieved that the transaction was a sound business arrangement which was intended to assist the appellant. They lost their case on a purely technical ground.

The appellant's defence, it must be appreciated, did not succeed in its entirety. In the 1st and 2nd paragraphs of the defence the appellant denied owing the respondents the money. He claimed that the cost of the fuel was deducted at source from the payments which were made to him. He implied here that he made all the trips required by the agreement between himself and the respondents. He failed totally in this defence. He succeeded only in the alternative defence which was pleaded in paragraphs 3, 4 and 5 of his defence. The respondent, therefore, successfully resisted the first part of the appellant's defence.

We believe that there are present in this appeal sufficient materials upon which this Court can exercise its discretion in refusing the appellant his costs both in this Court and in the Court below. We consequently set aside the order of the High Court requiring the appellant to pay costs relating to proceedings in that court on the Subordinate Court Scale. We at the same time order that the appellant shall not be entitled to costs both in this Court and in the Court below. Costs already paid by the respondents following the order of the High Court shall be paid back to them.

DELIVERED at Blantyre this 20th day of March, 1992.

(Sgd) .....
UNYOLO, J.A.

(Sgd) .....
MKANDAWIRE, J.A.

(Sgd) .....
TAMBALA, J.A.