IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 38 OF 2000

(Being High Court Civil Cause No. 56 of 1999)

BETWEEN:

KNIGHT FRANK.....1ST APPELLANT

- and -

BLANTYRE SYNOD.....2ND APPELLANT

- and -

STEVEN AIPIRA ACHAJE
t/a MVUMBA INVESTMENTS.....RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE
THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE MTEGHA, JA
Kalua, Counsel for the Appellants
Mtambo (Dr), Counsel for the Respondent
Mbekwani (Mrs), Official Interpreter/Recorder

J U D G M E N T

Unyolo, JA

This is an appeal against an order of assessment of damages made by the Registrar of the High Court on 27th September 2000.

The brief facts of the case are that by a contract made on 27th August 1999, the 2nd appellant agreed to let a building to the respondent, to be used as school premises for a private secondary school. The 1st appellant is a firm of estate agents and they acted for the 2nd appellant in the transaction. Hardly a month later, the 2nd appellant terminated the contract. The respondent made an effort to plead with the 2nd appellant to reverse the decision rescinding the contract, but this came to nought. The respondent then brought an action in the High Court claiming both special and general damages against the two appellants, for breach of contract.

The matter was not disputed and a consent judgment was entered against the appellants for damages to be agreed or assessed by the learned Registrar in the event of the parties failing to reach an agreement. The latter happened and the matter therefore came before the learned Registrar for the assessment exercise. After hearing evidence and Counsel, the learned Registrar awarded the respondent the sum of K29,747.00 as special damages in the form of loss of capital investments, and the sum of K1,229,940.00 as general damages for loss of business. The appellants appealed to this Court contending that the awards are on the high side. On the other hand, the respondent has cross-appealed arguing that the awards erred on the low side.

The first point taken by the appellants relates to the award of special damages. The respondent claimed the sum of K49,387.00 under this head, being damages emanating from what he spent in preparation for the opening of the school. As we have just stated above, the learned Registrar awarded the respondent the sum of K29,747.00 only. This included the sum of K1,400.00 for printing costs of registration forms, the sum of K4,788.00 for meals provided and transport refunds paid to teacher interviewees and the sum of K9,500.00 paid to a watchman. The appellants contend that the award made by the learned Registrar on these three items cannot be sustained on the ground that there was no evidence on which the award could be made. Counsel for the appellants submitted that since the claim under this part was for special damages, the same had to be proved strictly. Counsel pointed out that the respondent failed to produce receipts to prove the expenses claimed and that the respondent therefore failed to prove his claim to the requisite standard. In reply, Counsel for the respondent said that he did not have much to say on this point, save to point out that although the respondent indeed failed to produce in Court the relevant receipts to support his claim, the learned Registrar, nonetheless, believed his oral evidence that the expenses claimed were incurred.

We agree with Counsel for the appellants that special damages must be proved strictly. In fact, the rule is that such damages must be specifically pleaded and proved strictly. The point is that special damages are damages that have already crystallized before a case come to court, and the plaintiff must therefore be able to prove such damages strictly. This poses the question of what is meant by saying that special damages must be "proved strictly". Does it mean that special damages must be "proved beyond reasonable doubt"? We would answer this question in the negative. The standard of proof in civil cases is on a balance of probability and not beyond a reasonable doubt as is the standard generally in criminal cases. Rather, what it means is that special damages cannot be presumed as is the case with general damages. The plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he alleges in his pleadings to have suffered. A follow-up question is, does it mean that a plaintiff must always produce receipts or other documentary evidence in support of his case, as was contended by Counsel for the appellants in the present case? Again, we would answer this question in the negative. We accept that such receipts would proffer the best evidence, but there is no rule of law which requires a party to adduce such evidence, best evidence that is, in order to prove a civil case. In our judgment, it is principally a question of whether the plaintiff's evidence, even if only oral, is believed by the court. Having said this, we would add that there could be situations where, for example, a plaintiff would, as a matter of common sense, be expected to produce documentary evidence, and if no satisfactory explanation was given, such a situation would impact negatively on the plaintiff's credibility. Reverting to the present case, it is noted that the respondent tendered in evidence a copy of the standard letter that was used to invite for interview the teachers that had responded to his advertisement for vacancies at the school. Exhibits P14 and P15 refer. As regards to the watchman's wages, the respondent said that the watchman signed for this in a notebook which was used as a wages register, and that unfortunately, the notebook could not be found. We would accept that the respondent could instead have called the watchman as a witness, but in our judgment, to insist on that would be vain pedantry on the facts of this case. Surely, it is not difficult to imagine that the respondent would have engaged a watchman to guard the premises. It is also to be noted that the respondent emerged unscathed in his evidence. On the totality of the evidence, it is clear to us that the respondent went very far in his preparations for the opening of the school and there can be no doubt that he spent the monies he claims under this head. Indeed, the amount he claimed is, as we have seen, quite modest. The appeal on this aspect must therefore fail.

We now turn to general damages. The learned Registrar awarded the respondent K1,440,000.00 for loss of business. He found that the respondent would have started with four classes of 60 pupils each class and that each pupil would have paid fees in the sum of K2,000.00 per each of the three terms of the first year. By simple multiplication, 60 x 4 x 2000 x 3 = 1,440,000.00, hence the K1,440,000.00 awarded. The appellants contend that the finding by the learned Registrar, that the respondent would have enrolled 60 pupils per class, was against the weight of the evidence adduced. Counsel for the appellants submitted that going by the respondent's own evidence, each class would have

taken not more than 15 pupils. The respondent's letter, which was produced in evidence at the assessment as Exhibit P4, states in unequivocal terms that the building was "too small" and would not "take more than 15 pupils per class". In reply, Counsel for the respondent stated that the truth of the matter was that the rooms were big enough to accommodate more than 60 pupils per class. He sought to invite this Court to visit the premises and see for itself the size of the rooms. To be fair, when taxed, Counsel did not press for the visit. It should however be noted that requesting this Court to visit the premises amounts to asking this Court to receive fresh evidence on appeal. Under rule 24 of the Supreme Court of Appeal Rules, it is not open, as of right, to any party to an appeal to adduce new evidence. The court may allow such evidence only if it thinks that doing so would be in the interests or furtherance of justice. In **Circle Investments Ltd vs Continental Motor Agencies Ltd, 11 MLR 125,** this Court upheld the practice obtaining in England, where no new evidence pertaining to matters up to the time of the original hearing can be adduced on appeal except on special grounds, for example, where the new evidence could not have been obtained with reasonable diligence in the lower Court, and if it was credible and such that it was likely to influence the result of the case. In the present case, it is noted that the appellants were not at all zealous during the assessment hearing to have the Court below visit the school premises. On this ground alone, the request to have this Court visit the premises was bound to be rejected. Anyway, as we have pointed out, Counsel for the respondent did not press the point; rightly so, because the respondent must live by what he said in his letter to the 2nd appellant, in which, as we have indicated, he described the building as "too small" and could not "take more than 15 pupils per class". In the final analysis, we find that there is merit in the appellants' submission that the finding by the learned Registrar, that the premises were able to accommodate 60 pupils per classroom, was not borne out by the evidence. We agree with the submission that the evidence instead established that the premises could accommodate 15 pupils per classroom. Using this figure, 15 x 4 x 2000 x 3, gives a figure of 360,000.00, which translates to K360,000.00. The appellants' appeal on this aspect therefore succeeds and the learned Registrar's award under this head is set aside and reduced to the extent of this new figure of K360,000.00.

Finally, the appellants attacked the learned Registrar's finding as regards the anticipated operational costs of the school. The learned Registrar upheld the respondent's contention that the operational costs of the contemplated school would have been K67,020.00 per term, in the form of projected salaries, wages, rental and electricity bills. Counsel for the appellants argued that there was no evidence that any person had been offered the posts in respect of which the said salaries and wages were claimed, and further that there was no evidence justifying the various amounts stipulated. With respect, there does not appear to be much force in the appellants' submission on this point. The record shows that the respondent did testify on these matters, and he actually produced in evidence a cash flow projection and a statement of account in support of his evidence. It is noted that the respondent emerged unchallenged in his evidence. Counsel for the appellants also contended that there were other items of expenditure such as city rates and other property charges which the respondent did not include in this regard. Counsel submitted that had the respondent included all these other charges, the figure for operational costs of the

school would have been much higher. It is to be observed that the appellants did not raise this particular issue in the lower Court. With respect, it is now too late to raise the issue in this Court. In the circumstances, the learned Registrar cannot be faulted on this aspect of the case.

The final result is that the appeal succeeds in part, to the extent we have indicated above. As we have seen, the award in the sum of K29,747.00 for special damages, has been upheld. The award for general damages, on the other hand, has been reduced from K1,440,000.00 to K360,000.00. This makes a total of K389,747.00. We have then upheld the figure of K67,020.00 per term for anticipated expenses, which comes to K201,060.00 for three terms. This amount should be deducted from the sum of K389,747.00 above. The balance is K188,687.00, which is the award the respondent was entitled to.

This appears to be an appropriate juncture to turn to the respondent's cross-appeal, where, as earlier shown, it was contended that the amounts awarded by the learned Registrar erred on the low side. For the reasons we have advanced above in relation to the appellants' appeal, the cross-appeal must fail, and it is dismissed.

It now remains to us to set aside the award made by the Court below, which we do, and in its place award the respondent the said sum of K188,687.00 mentioned above.

Each party is to bear its own costs.

DELIVERED in open Court this 23rd day of August 2001, at Blantyre.

Sgd _____

R A BANDA, CJ

Sgd _____

L E UNYOLO, JA

Sgd _____

H M MTEGHA, JA