IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 2 OF 2002

(Being High Court Civil Cause No. 680 of 2000)

BETWEEN:

MARK KATSONGA PHIRI.....APPELLANT

- and -

CANDLEX LIMITED.....RESPONDENT

BEFORE: **THE HONOURABLE MR. JUSTICE TAMBALA**

Mhone, Counsel for the Appellant

Ndau, Counsel for the Respondent

Mchacha, Official Interpreter

RULING

TAMBALA, JA

This is a defendant's appeal on an interlocutory matter. The respondents commenced an action in the court below by means of a writ against the appellant. In the action the respondents demanded from the appellant possession of two office rooms on premises

known as plot number CC 936 situated at Maselema in the City of Blantyre.

Actual trial of the action commenced and the respondents called three witnesses who gave evidence and thereafter closed their case. When the appellant was about to open his case, his Counsel made an application requesting the learned Judge, in the court below, to dismiss the action, on the ground that Counsel for the respondents lacked authority to commence an action against the respondents who are a limited liability Company. Counsel for the appellant made submissions in support of the application and as he was about to conclude making the submissions, he made an oral application for the production and inspection of minute books of the respondents company. The present appeal arises from the refusal by the learned Judge, in the court below, to make an order for the production and inspection of the minute book.

There are two grounds of appeal. The first is that the learned Judge erred in refusing to grant an order for production of minute books of the respondents company. The second is that the learned Judge erred in interpreting a notice to produce formal original evidence as a fishing expedition.

Mr. Mhone representing the appellant suggests that the minute books are required to satisfy the **best evidence rule**. That requires a party to an action to produce before court the best available evidence for purposes of proving relevant facts. In the present case copies of minutes of Board of Directors were produced. Mr. Mhone says, that is secondary evidence. He contends that the court ought to have the best evidence being the original minutes and these can be found in the minute books of the respondents.

Trial of an action commences after the time set for discovery and inspection of documents has expired. If Mr. Mhone required the minute books to enable him to defend the action, he would have made the application soon after the exchange of lists of documents. All the witnesses for the respondents testified before the court below and Mr. Mhone did not cross-examine them on the question of production of the original minutes. I am unable to see how the original minute books have suddenly become important or necessary. Mr. Mhone has not been able to explain satisfactorily why he delayed before demanding the minutes books. At what stage in the course of the trial did Mr. Mhone see the need for the minute books? I have not been able to get a satisfactory answer from Mr. Mhone's submissions.

A person seeking an order for production and inspection of documents must show that the required documents are **necessary for fairly disposing of the cause or matter or for saving costs**: see 0.24, r.13(1) of Rules of Supreme Court. Demanding production and inspection of minute books of a company at a very late stage of a trial cannot be said to be done for the purpose of saving costs. I am also unable to see how the production of such documents are necessary for fairly disposing of the or matter between the parties in

this case. The burden lies on the appellant to show the necessity for the production of the documents: **Paragraph 23/13/1 of the Supreme Court Practice (1995)**. I am not satisfied that Mr. Mhone has successfully discharged that burden.

Mr. Mhone probably seeks the original minutes to assist him in his application to dismiss the action for want of authority from the respondents. Mrs. Kanyuka the Chairperson of the Board of Directors and Mr. Michael Hubbe the Managing Director of the respondents gave evidence for the respondents. Mr. Mhone did not cross-examine these important witnesses on the issue of lack of instructions to sue on the part of Counsel for the respondents. Then both Mrs Kanyuka and Mr. Hubbe swore affidavits in opposition to the appellant's application to dismiss the action. They contended in their affidavits that Counsel for the respondents was duly authorised to commence the action. Mrs Kanyuka stated in her affidavit that as a matter of fact she had warned the appellant that legal action would be taken against him. In the light of the oral and affidavit evidence of Mrs Kanyuka and Mr. Hubbe, it is difficult to appreciate what Mr. Mhone is looking for in the minute books. I would agree with Counsel for the respondents and the learned Judge in the court below that the application for the production of the minute books is simply a fishing expedition undertaken by Mr. Mhone. Again, coming late as it does, in the course of the trial, Mr. Mhone's application is probably nothing more than a delaying tactic.

The appellant's application is not specific. It does not specify the minute books which are required. It is pointed out by the respondents that the company has been in existence for about 20 years and yet the application did not specify the documents in terms of the period to which they relate. Surely the appellant does not want minute books covering the entire period of 20 years. The appellant's application could be rejected for being too wide or vague.

The decision whether to allow an application for the production and inspection of documents is a matter which lies within the discretion of a trial Judge. As a general rule a Court of Appeal is slow to interfere with the exercise of such discretion. However an appellate court may intervene, though rarely, where it is shown that the Judge misdirected himself in law, took into account irrelevant considerations, failed to exercise his discretion or reached such a conclusion as no reasonably minded Judge properly directed could reach: See **DISCOVERY: By P. MATTHEWS, 2nd Edition P. 129.** After considering the nature of the action between the parties and the available evidence including that relating to the application for production of documents, I am unable to find any good reason for interfering with the learned Judge's exercise of his discretion, when he rejected the appellant's application in this matter. I would consequently dismiss the appellant's appeal. As I took the view that the present appeal was merely a delaying tactic, I order the appellant to pay, in any event, the costs relating to the application for production of documents, both in this court and the court below.

MADE in Chambers, this 8th day of March, 2002, at Blantyre.

D.G. Tambala

JUDGE OF APPEAL