IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 22 OF 2001

(Being High Court Civil Cause No. 1155 of 1994)

BETWEEN:

H.H. CHIKAONEKA t/a .....APPELLANT
MADALITSO CLOTHING FACTORY

- and -

INDEFUND LIMITED.....RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE MTEGHA, JA
THE HONOURABLE MR. JUSTICE KALAILE, JA
THE HONOURABLE MR. JUSTICE TAMBALA, JA

Mbendera, Counsel for the Appellant

Mzunga, Counsel for the Respondent

Mchacha, Court Interpreter

JUDGMENT

This is the plaintiff's appeal against the decision of Twea, J, made on 29th May, 2001 at Blantyre. The plaintiff brought an action in the High Court and sought damages for tresspass, conversion and loss of use. The subject matter of the action were some eleven sewing machines which were seized and later sold by the respondents on the strength of a bill of sale which was later found to be invalid. During the course of hearing the appeal the liability of the respondents for conversion was not contested. The present appeal is, therefore, concerned with the issue of damages, and in particular the adequacy of the damages awarded by the learned judge in the court below.

The issue of adequacy of damages is compounded by the fact that, in the court below, the case suffered enormous delay between the time of commencement and the time that judgment was delivered. The matter was brought to court on 9th June, 1994 when a writ

of summons was issued. The trial which essentially consisted of the hearing in chambers of several interlocutory applications and one witness who gave evidence on the issue of damages, covered a period of three years, i.e. from 3rd November, 1994 to 27th January, 1998. It is important to note that the one witness who gave evidence was brief. Besides, he was not cross-examined and his evidence covers only four pages of the case record. After the hearing was concluded on 27th January 1998, it took a further three years and four months before judgment was delivered on 29th May, 2001. Such delay is inexcusable and a disgrace to the judiciary as regards the manner in which it performs its functions.

The trial judge eventually gave judgment in favour of the appellant. He awarded the sum of K90,000.00 for conversion in respect of some nine sewing machines, K40,000.00 for loss of use of the converted goods and K5,000.00 for tresspass. The total sum awarded came to K135,000.00. The appellants were also awarded costs of the action. In the present appeal the appellant attacks the damages awarded for conversion and loss of use as inadequate. He urges this court to enhance them. The respondents contend that the damages awarded by the learned judge in the court below are proper and adequate and that there exists no legal basis which would justify their interference by this court.

The facts of the case are that in October, 1992, the appellant obtained a loan of K166,200.00 from the respondents. He required the funds to purchase eleven industrial sewing machines to use in his business of manufacturing clothes. The loan was secured by a bill of sale which was duly signed by the appellant. Soon after obtaining the loan, the appellant defaulted continuously in servicing it. The respondents were then compelled to enforce the bill of sale and they did so on 21st March, 1994, by seizing and later selling the eleven sewing machines which were the subject of the bill of sale. Unfortunately the bill of sale on the strength of which the machines were seized was later found to be null and void for want of attestation and registration. Consequently the seizure and disposal of the eleven machines by the respondents was held to be unlawful and to constitute the tort of conversion.

The law is clear on the issue of assessment of damages for conversion of goods. The plaintiff in a case of conversion is entitled to the value of the goods at the time of conversion and any loss arising therefrom which would include change in the market value of the converted goods; such loss is termed consequential loss: See **SACHS vs MIKLOS AND OTHERS** (1947) C.A. 24; see also **McGREGOR ON DAMAGES 15th Ed PAR** 1313. In the case of HALL V. BARCLAY (1937) C.A. 620, GREER L.J., stated at page 623.

“In my judgment, it is an undoubted fact that there are two rules with which we begin in ascertaining how the damage should be ascertained. The first is this: A plaintiff who is suffering from a wrong committed by a defendant is entitled, so far as money can do it, to be put in the same position as if he has not suffered that wrong. That is what is referred

to as **restitutio in integrum.**

The Lord Justice added:

"Where you are dealing with goods which can readily be bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article in the market."

The further evidence which has been accepted in this court shows that the machines which were selling at K10,000.00 each as second hand at the time of conversion in 1994, would attract the price of K77,500.00 for a new machine and K50,000.00 for a second hand. In May 2001, at the time when judgment was delivered in the court below. In view of the rule stated by GREER L.J., in the case of**HALL vs BARCLAY**, we accept Mr. Mbendera's contention that the appellant is entitled to be paid K50,000.00 for each sewing machine which was seized and wrongly disposed of by the respondents. Consequently we set aside the amount of K90,000.00 which the learned judge awarded as damages for the conversion of nine sewing machines. During the hearing of the appeal it was established that the appellant was entitled to be compensated for all the eleven sewing machines which were seized and converted by the respondents. We therefore come to the conclusion that the appellant is entitled to K550,000.00 as damages for conversion.

We must now consider the issue of damages for loss of use. The learned judge in the court below awarded K40,000.00 for loss of use of the eleven sewing machines wrongfully converted by the respondents. The appellant complains that the amount of damages is grossly inadequate. In his carefully written submissions learned counsel for the appellant requests this court to award K4,500,000.00 for loss of use.

The one witness who gave evidence in the court below stated that the appellant's business before the seizure of the machines used to make a profit of between K10,000.00 and K15,000.00 per month. He was however unable to produce supporting documents to prove the profit claimed. The relevance or significance of such evidence is unclear to us. The appellant in his pleadings did not claim damages for loss of profits or business. Evidence relating to the profit which the appellant's business was making was totally irrelevant and should have been ignored by the trial judge. However, it would seem that the learned judge bore in mind the evidence relating to the profits of the appellant's business when he considered the issue of damages for loss of use: See page four of the judgment of the learned judge. From the figure of K40,000.00 which he awarded the appellant it is difficult to ascertain to what extent the learned judge was influenced by the irrelevant evidence. He probably attached very little or no weight to it.

A careful consideration of counsel for the appellant's submissions relating to damages for loss of use discloses that the figure of K4,500,000.00 is based on loss of profits of the appellant's business for a period of seven years, i.e., from the date of conversion to the date of judgment in the court below. We are unable to see any difference between damages claimed by the appellant as damages for loss of use and damages which could

have been awarded for loss of profits of the appellant's business. It would seem to us that the appellant is claiming damages for loss of business or profits disguised as damages for loss of use. This would explain why there is a huge difference between damages representing the value of the converted sewing machines which came to K550,000.00 and the damages claimed for loss of use which are said to amount to K4,500,000.00. What is it in loss of use which can account for such a difference. We think that the appellant's claim for loss of use in this appeal lacks transparency.

But counsel for the appellant claims that he has the support of authority for the approach that he has taken relating to a claim for damages for loss of use. It is submitted by learned counsel that in the cases of **VICTORIA LAUNRY LIMITED vs NEWMAN** (1949) 2 KB.528,**GONDWE vs BARROS ENGINEERING** 11 M.L.R. 40 AND **MDUMUKA vs MPHANDE** 7. M.L.R. 425 can be found the proposition that a party cannot be deprived of the right to recover damages merely because the damages are difficult to assess or that such damages cannot be properly assessed. The **Mdumuka's** case goes on to stress that such difficulties must be left in the good hands of the court to assess as best as it can what it considers to be an adequate recompense for the loss suffered. We have no difficulty in accepting that proposition; but we think that those cases do no more than indicate the difficult task faced by a court in assessing damages, especially general damages, the assessment of which is left in the court's discretion. We do not however think that those cases contain anything which would absolve a plaintiff from his duty to specify the type of damages which he seeks the court to give him and also his duty to prove such damages. It is the undoubted duty of the plaintiff to indicate clearly in his pleadings the kind of damages which he seeks from the court and it is also his duty to prove such damages in court. That duty is not affected or modified by the cases cited by the learned counsel.

In the case of **Gondwe vs Barros Engineering** the plaintiff had not operated his maize mill business for one year before he took a maize mill part to the defendants for repairs. The part got stolen while it was at the business premises of the defendants. In supporting his claim for loss of profits the plaintiff relied on old business records. Banda J., as he then was stated that the plaintiff had acted reasonably in basing his claim upon older business records. We think the learned Judge in that case acted properly in accepting evidence from older business records. In the present appeal, even the old business records were not available. The only evidence regarding the amount of profits which the business was making was a witness's bare statement; there were no supporting documents. Was it correct that the profits were in round figures of K10,000.00 or K15,000.00 a month? The evidence of the witness appears to be the product of guess work. Again in the Gondwe's case there was a claim for loss of profits and it would seem that this claim was specifically pleaded. The plaintiff's case in the present appeal is different. The plaintiff's pleadings did not contain even a suggestion of damages for loss of profits or business. We are unable to see any resemblance between the Gondwe's case and the present appeal.

In **HASSEN vs S.R. NICHOLAS LIMITED** 11 M.L.R. 505, the plaintiff sought to recover the cost of car hire, during the time his car was being repaired, from the defendants. It took three months before the car was repaired and delivered to the plaintiff. When a question arose during the trial why it took so long to repair the car, the plaintiff could only answer that he was told that it was due to non availability of spare parts. That explanation was successfully attacked as hearsay. In the course of delivering his judgment BANDA.J., as he then was stated:-

Therefore, it is clear that there was no evidence to show why it took so long to repair the plaintiff's vehicle. In the absence of such evidence, it becomes the duty of the court to do its best in arriving at what would be a reasonable period for such repairs to take place. The three months which the learned Registrar found cannot, in my judgment, be said to be an unreasonable period.

It would seem that in the Hassen case there was a specific claim for the special damages relating to the cost of car hire. There was uncontroverted evidence to show that the plaintiff's car spent three months at the garage. It was only the explanation for such long period which proved difficult for the plaintiff to prove. However the learned Registrar found the period to be reasonable. For the same reasons stated in relation to the case of **Gondwe vs Barros Engineering** we take the view that there is no resemblance between the Hassen's case and the present appeal where the appellant did not seek damages for loss of profits and also failed to produce credible evidence to prove such loss.

It is clear to us that what Counsel for the appellant seeks is that this court should assist the appellant in proving damages for loss of profits of the appellant's business by using some vague doctrines of reasonableness and a proposition that a party cannot be deprived of the right to recover damages merely because the damages are difficult to assess or that such damages cannot be properly assessed. Learned Counsel also seeks to be assisted to substitute damages for loss of profits for damages for loss use. The approach he has taken in his submissions would result in the appellant obtaining damages for loss of profits disguised as damages for loss of use. That would be unacceptable to us.

It is the clear principle of the law that special damages, such as loss of profits or business must be specifically pleaded and strictly proved by the plaintiff during trial: See the case of **GENERAL FARMING LIMITED vs CHOMBO** M.S.C.A. Civil Appeal No. 15 of 1995 (unreported). Also see the case of **PERESTRELLO E. COMPANHIA LIMITADA vs UNITED PAID COMPANY LIMITED (1969) W.L.R 570.**

We do not think that the cases which learned Counsel cited in support of the approach which he took in relation to damages for loss of use contain anything which has the effect of changing that settled principle or materially modifying it. The appellant, in the court below, did not specifically seek damages for loss of profits or business. He failed to

prove them during the hearing relating to assessment of damages. He cannot, in our view, obtain such damages in this court in a different form.

We agree with the learned Counsel for the respondents that damages for loss of use are basically general damages and that they are awarded on a modest scale. We would add that the award of such damages is a task which lies within the exercise of the court's discretion. That damages for loss of use are generally modest can be illustrated by the Hassen case where K1,200.00 was considered to be adequate compensation for loss of use for three months of a prestigious car, a Mercedes-Benz. However bearing in mind the value of the eleven sewing machines the subject of the present appeal and the period of time over which the appellant was deprived the use of the property we think that the amount of K40,000.00 was, under the circumstances glaringly inadequate. We, therefore, set it aside and substitute in lieu thereof a sum of K100,000.00 as damages for loss of use.

The result is that the appellant is awarded a total sum of K655,000.00 representing damages for conversion, loss of use and tresspass. The appellant is also awarded costs of this appeal. The appeal is, to a great extent, allowed.

DELIVERED in Open Court this 11th day of November, 2002 at Blantyre.

Sgd.....

H.M. Mtegha, JA

Sgd.....

J.B. Kalaile, JA

Sgd.....

D.G. Tambala, JA