



IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MSCA Civil Appeal No. 6 of 2013

(Being High Court of Malawi (Commercial Division), Blantyre Registry, Commercial
Cause No. 58 of 2010)

Between:

Z.M. Dzinyemba t/a Tirza Enterprise.....Appellant

And

Total Malawi Limited.....Respondent

Coram: Honourable Justice E.B. Twea SC, JA

Honourable Justice A.C. Chipeta, JA

Honourable Justice L.P. Chikopa, JA

Kalanda and Bazza, of Counsel for the Appellant

Chalamanda, of Counsel for the Respondent

Chintande (Mrs)/ Minikwa, Official Interpreters

Chipeta JA

JUDGMENT

This is an appeal from the judgment of the High Court of Malawi, Commercial Division, sitting at Blantyre. It is clear, just from a cursory look at the pleadings, that the litigation of this matter in the Court of first instance was quite a troubled one. The pleadings kept so shifting that by the time hearing was taking place, they had successfully graduated from the initial Writ, Statement of Claim, and Defence the parties had started with to a Re-re-re-Amended Writ, a Re-re-re-Amended Statement of Claim, and a Re-re-re-Amended Defence. There is even an Amended Reply to the Re-re-re-Amended Defence on record.

The Appellant, who was the Plaintiff in the matter, is Z.M. Dzinyemba t/a TIRZA ENTERPRISE. By his final pleadings in the Court below, he averred that by three Marketing Licence Agreements commencing on different dates in the years 2000, 2001, and 2003 the Defendant, Total Malawi Limited, licensed him to be marketing its products at his Thunga, Mulanje, and Mount Pleasant Filling and Service Stations. He listed up to 4 of what he claimed were the express terms of these agreements, and pointed out that the fourth term did not apply to the Mount Pleasant Filling Station. He then listed up to 6 of what he alleged were the implied conditions of these agreements. It was the Appellant's claim that during the subsistence of these agreements he had experienced heavy fuel tank losses at all three Filling and Service Stations, and that despite him having on numerous occasions in writing asked the Respondent to investigate these losses, the latter

completely failed or neglected to attend to these requests. He claimed, therefore, that in consequence of this he had lost 37,741.77 litres of diesel and 15,819.7 litres of paraffin. It was his further claim that the Respondent must have supplied him with defective equipment, and he thus attributed this loss to this allegation. In particular he had alleged that a number of times the equipment the Defendant had so supplied him with had lagging totalizers, leaking tanks, leaking pipes, and overthrowing pumps.

Besides the above, it was also the Appellant's allegation in the pleadings that during the subsistence of these agreements he had discovered that at all three Filling and Service Stations, the Respondent (then Defendant) had been delivering to him less fuel than he used to order and pay for. On notification of the said party about these short deliveries, he claimed that the later had said that it could only give him credit for such short delivered fuel if he could show that he had caused the delivering Drivers to counter-sign for such short deliveries. On this point the Plaintiff pointed out that initially the Respondent had been supplying delivery notes that had space for its Drivers to counter-sign on for whatever fuel they delivered, but that it had later unilaterally substituted these delivery notes with delivery vouchers that had no space for such counter-signature by the said Drivers. Further than this, the Appellant had averred that his efforts to ask the Defendant's Drivers to counter-sign delivery vouchers that had no such space for counter-signing had proved futile. Despite complaining about the mischief alleged herein, the Appellant had averred that it was only as from October, 2005 that the Respondent obliged by re-designing the said delivery vouchers by once again including space on them on which Drivers could be expected to counter-sign. On

the subject of alleged short deliveries the Plaintiff's claim was that the Defendant had put him to loss of 14,256.7 litres of petrol, 16,002 litres of diesel, and 4,961 litres of paraffin.

Putting together all the losses the Appellant claims he incurred, both through the alleged tank losses and through short deliveries, his complaint was that despite reminding Total Malawi Limited numerous times about these losses, it did not and has not re-imbursed or paid him anything at all. He thus ended up putting the aggregate of his losses in this regard at 65,880.8 litres of petrol, 53,743.77 litres of diesel, and 20,780.8 litres of paraffin. His claim against the Respondent, therefore, was the equivalent cash value of all the fuel he had so represented as lost. Further complaining that these losses had been incurred in transactions that were commercial, the Plaintiff further demanded that he be paid interest at 2% above the commercial banks base lending rate applicable from time to time from the date of issue of the Writ until payment, or until such time as might be deemed fit by the Court. The Plaintiff finally sought to recover the costs of his action.

The Respondent in the appeal, which was the Defendant in the Court below, is Total Malawi Limited. Its response to all of the claims of the Appellant in that Court was that while it was admitting that it had three Marketing Licence Agreements with him, and while further conceding that the first three terms as alleged in the suit indeed applied to the agreements in question, beyond that it denied most of what he had next asserted. The Respondent began with disputing the completeness of the procedure the Plaintiff had laid out as the only applicable procedure for addressing short deliveries. The procedure that had been averred

by the Appellant, it pointed out, only constituted part of the agreed procedure. Referring to the further and better particulars it had served on him as Plaintiff on 4th August, 2009, it indicated that the remaining part of the procedure for fuel delivery and recovering of short deliveries was fully captured there. The Respondent had further averred that the said procedure was made known to every Filling Station Dealer through a Station Manual Book it gave out during initial training before the commencement of every Dealership Agreement.

Next, the Respondent had denied all of the Appellant's allegations as are covered in paragraphs 5 to 11 of the Statement of Claim and had put the said party to strict proof of all those allegations. Thus, it had denied (i) the applicability of the 6 terms the Appellant had implied into these agreements, (ii) the claims that the Appellant had experienced heavy fuel tank losses and that he had written to it several times to investigate the cause of such losses, (iii) the claim that the listed quantities of Petrol, Diesel, and Paraffin had been lost due to the Respondent's failure or neglect to attend to the Appellant's written requests, (iv) the claim that a number of times, the Respondent's equipment had been found to have lagging totalizers, leaking tanks, leaking pipes, and overthrowing pumps, but for which the Appellant would not have suffered fuel losses, (v) and that only in respect of the Mount Pleasant Filling Station, and only for the period 15th September, 2004 to 13th January, 2005, the Respondent had offered to shoulder 50% of the loss occasioned by a lagging totalizer. Beyond this, the Respondent had averred that if indeed there had been any such defects of equipment as led to the losses the Appellant had claimed, then the same had occurred through no fault of it, and that it therefore bore no responsibility for any such resultant product loss. The

Respondent had further denied the occurrence of any short deliveries as had been claimed.

Next, upon admitting that it had been insistent that it could only give the Appellant credit for fuel short delivered if he had caused the concerned Drivers to countersign for such on the space provided on the said delivery notes, the Respondent had further denied all allegations the Appellant had made against it in paragraphs 15 to 19 of his Re-re-re-Amended Statement of Claim and demanded strict proof thereof. The Respondent had accordingly denied (i) ever having stopped issuing delivery notes with space for Drivers to countersign on for short deliveries, (ii) having ever created a situation where Drivers refused to countersign on the delivery notes that had no space for countersigning whenever they short delivered, (iii) the allegation that the Appellant had written it asking that it assist by asking its Drivers to all the same countersign delivery notes that had no countersigning space, and that it had not co-operated in this respect, (iv) the claim that it is only from October 2005 that the Respondent had redesigned its delivery notes to their original form where they bore space for countersigning in the event of a short delivery, and (v) the claim that it had treated the Appellant differently from other dealers, whom it had credited for short deliveries despite their delivery notes not being countersigned by the delivery Drivers.

Beyond this, the Respondent had denied contractual liability to compensate the Appellant for any short deliveries, if there had been any. Further or in the alternative, it had averred that if at all there had been any short deliveries, which it denied, the Appellant had failed to comply with the procedure for recovering

short deliveries as provided for in the Marketing Licence Agreements. As for its alleged favouring of other Dealers with credit for short deliveries on delivery vouchers that had not been countersigned, which it denied doing, the Respondent had averred that doing so would not have imposed any contractual obligation on it to honour claims from the Appellant if they had not been made in accordance with the Marketing Licence Agreements.

All in all, the Respondent had denied being liable to the Appellant for any of the claims made, and pleaded that if at all found liable for any of those claims, then the same should be calculated on the prices of the respective products at the time the losses were allegedly suffered, and not at any later market price. In the alternative, if damage for any of the denied claims should be calculated on the basis of the prevailing market price, then the Appellant should not be entitled to any interest thereon. Furthermore, while still denying all of the Appellant's claims, the Respondent had averred that if found liable for any of those claims, the same should be set off, or deducted, in the light of what are known as allowable losses as per the agreements as provided in the Station Manual.

At the hearing of the matter in the Court of first instance, which hearing was before the Honourable Justice Kapanda (as he then was), only two witnesses testified for the Plaintiff. These were Mr Zakaria Dzinyemba, who was the Plaintiff, and Mr Frank Kilembe. On its part, the Defendant likewise paraded two witnesses in support of the Defence case. These were Mr Luwani Nyasulu and Mr Kiddy Sumani. Upon carrying out a detailed analysis of the oral and documentary evidence of all these witnesses the Honourable Trial Judge on 15th December,

2011 delivered a Judgment dismissing the Plaintiff's case in its totality. The Honourable Judge in particular found that the Plaintiff had by far failed to prove all the special damages he had claimed. He pointed out that the Plaintiff had neither proved any tank losses of fuel as claimed, nor shown that if such happened then it was attributable to the conduct of the Defendant. Further, the said Court found that if indeed there had been any tank losses, then they must have been contributed to by the Plaintiff himself. The Court also found that in respect of the claim for loss of fuel on account of short deliveries, the Plaintiff had totally failed to substantiate the same. In this regard the Court observed that the Plaintiff had the means and ability to ascertain before any off-loading of fuel what quantities had been brought, and that he was also aware that he had the right and option to reject any such short-delivery thereof. He was, it pointed out, additionally aware that if he received any such short-delivered fuel, he could only successfully claim and be reimbursed for it if he strictly followed the prescribed procedure for recording and countersigning such short-delivery. The Trial Court also dismissed in full the claim the Plaintiff had lodged in respect of interest, and it finally penalized him for the costs of the action.

Dissatisfied with the whole of this judgment, the Plaintiff next lodged the present appeal, and the matter then came to this Court. The Notice of Appeal he so filed has nine grounds of appeal. In all, through these grounds of appeal, the Appellant disagrees with all the findings of the Trial Court. He in particular disagrees (i) that he (as Plaintiff) had not led evidence to prove that he had incurred tank losses, (ii) that he (as Plaintiff) was not entitled to delivery losses, (iii) that the doctrine of *res ipsa loquitor* could not avail him in the matter, (iv) that he (as Plaintiff) had

neither properly pleaded nor proved his claim for interest, (v) that the Station Manual and off-loading procedure in a letter dated 15th June, 2005 were part of the contracts between the parties, and (vi) that the costs of the action deserved to be awarded to the Defendant.

By way of relief, the Appellant prays in this appeal that the judgment of the lower Court be set aside, and that instead this Court should award him the cash equivalent of all the fuel he claimed he had lost, interest thereon as pleaded or at the rate this Court might deem fit, costs of the appeal and for the proceedings in the Court below, as well as such other relief as this Court might deem fit and just to grant him. In support of the appeal, the Appellant filed skeleton arguments as well as supplementary skeleton arguments.

In opposing the appeal, the Respondent in turn filed its own skeleton arguments. Its first line of attack on the same was procedural, and this came by way of its raising of a preliminary objection against the hearing of this appeal. On the basis of this objection, the Respondent's prayer was that the Court should just summarily dismiss this appeal. The Respondent's central observation was that the Appellant has not drawn his grounds of appeal in line with the requirements of the law. It, in particular, invited our attention to Order III rules 2(2), 2(3) and 2(4) of the Supreme Court of Appeal Rules under the Supreme Court of Appeal Act (Cap. 3:01) of the Laws of Malawi.

The rules in question happen to be couched as follows: (a) Order III (2)(2) *"If the grounds of appeal allege misdirection or error in law the particulars and the*

nature of the misdirection or error shall be clearly stated,” (b) Order III (2)(3) “ The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively,” and (c) Order III 2(4) “No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the ground that the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent.” It is the argument of the Respondent that contrary to the above provisions, the grounds of appeal the Appellant has filed in this matter do not state whether they are on points of law and/or on points of fact. It has further been contended that these grounds are vague or general, and that as such they do not disclose any reasonable cause of appeal. The Respondent prayed that the Appellant’s grounds of appeal must therefore be struck out, and that in consequence this appeal should be dismissed in its entirety.

In answering the preliminary objection, the Appellant has refuted the assertion that his appeal is incompetent. While referring to the same Order III and rule 2 of the Supreme Court of Appeal Rules quoted by the Respondent as a guide to the presentation of a competent appeal, he also referred to Order V of the same Rules as a provision enabling the Court to waive any non-compliance for it to proceed with the hearing of the appeal. He at the same time referred to Order III rule 34 of the same Supreme Court of Appeal Rules, which he argued opens room for reference to the procedure and practice of the Court of Appeal in England where there is no provision made by the local Supreme Court Rules.

Standing on this platform, the Appellant contended that Order III rule 2 of the Supreme Court of Appeal Rules is just a restatement of the Practice Notes found at paragraph 59/3/9 of Order 59 rule 3 the Rules of Supreme Court, and he proceeded to quote these at some length. Next referring to the case of **Taylor vs Taylor** [1957] 1 WLR 1182, he agreed with a quotation from the dictum of Jenkins LJ to the effect that the notice and grounds of appeal ought to be short and simple, and that they should not carry any legal arguments or narratives. Following this, he emphasized the point that his grounds of appeal clearly state the errors which the lower Court made and his reasons for so alleging. The Appellant's view, therefore, was that he had closely followed the pattern depicted in the said Practice Note 59/3/13 of Order 59 rule 3 of the Rules of Supreme Court, and that it thus cannot be argued that his grounds of appeal did not disclose the kind of case he wanted to advance at the hearing of this appeal.

A look at the arguments the parties have exchanged on this issue shows that while they mutually converge on Order III rule 2 of the Supreme Court of Appeal Rules as being the governing law on civil appeals that come to this Court, between the two of them it is only the Appellant that has shown preference for relying on the Practice Notes under Order 59 rule 3 of the Rules of Supreme Court rather than directly relying on the wording of Order III rule 2 of the Supreme Court of Appeal Rules as it is couched. It, however, strikes us that there could be danger in rushing to assume, as the Appellant appears to have done, that *prima facie* the resemblance he sees between this Order and rule and the Practice Notes he alludes to under Order 59 rule 3 of the Rules of Supreme Court necessarily means

that the two provisions are the same or equivalent. We say so because we apprehend there could be differences between the two statements of law, which one might easily gloss over if too anxious to draw parallels.

As a matter of fact, it happens to be our observation that in this case it cannot be entirely true to say that Order III rule 2 of the Supreme Court of Appeal Rules is just a restatement of what Practice Note 59/3/9 under Order 59 rule 3 of the Rules of Supreme Court contains. As can overtly be seen, whereas paragraph 59/3/9 in its content openly forbids Appellants from, in part, basing their appeals on such ground as merely asserts that the learned Judge's findings are against the weight of the evidence, Order III rule 2(4) of the Supreme Court of Appeal Rules does the exact opposite, in that it manifestly permits the inclusion of that type of ground of appeal. As can be easily confirmed from the mother provision, in material particulars, it reads: "*No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted save the general ground that the judgment is against the weight of the evidence...*" (emphasis supplied).

In light of our above observation, to us it matters not whether or not there are any other differences between the provisions which the Appellant has in this case put in issue before us. We must say that what we have just demonstrated above, at the very least, represents a major difference between the provisions he found it so easy to equate. In this respect we hold that it was erroneous for the Appellant to claim, as he has done, that what Practice Note 59/3/9 of Order 59 rule 3 of the Rules of Supreme Court provides is on all fours with the provisions to

be found in Order III rule 2 of the Supreme Court of Appeal Rules. In our judgment, the Appellant clearly does not have any sufficient justification for contending and inviting us to treat the two provisions as if they were just mirror images of each other.

It is therefore important, in our view, that Order III rule 2 of the Supreme Court of Appeal Rules should be given full and independent attention, and also that it should be obeyed as it stands. There is no reason why it should be treated as if it were a mere shadow of some pre-existing legal provision in England, which the Appellant feels more at home with. Further, as Section 8 of the Supreme Court of Appeal Act (cap 3:01) of the Laws of Malawi makes it abundantly plain, the practice and procedure of this Court ought to be in accordance with its governing Act and the rules made thereunder. Order III rule 2 of the Supreme Court of Appeal Rules being a component of the rules made under the Supreme Court of Appeal Act it, along with its parent Act, enjoys primacy over any other foreign rules we may be familiar with, attractive though those rules might appear to be. As it is, the law does not mince any words when it tells us that we are only permitted to look elsewhere for guidance if the Act and the rules made under it do not make provision for a particular point of practice or procedure. In this instance the correct rules do make provision on the point of practice or procedure that is in question. There is, thus, no need of looking outside what those rules have provided in order for us to discover what was expected of the Appellant in preparing his grounds of appeal in this case.

In evaluating the Appellant's Notice and Grounds of Appeal and all the arguments the parties have traded on the preliminary objection the Respondent raised against the hearing of this appeal, we have therefore specifically zoned our focus on Order III rule 2 of the Supreme Court of Appeal Rules in its unadulterated form. It is accordingly as against this Order and rule, along with its multiple sub-rules, that we proceed to vet whether in this instance the Appellant did, or he did not, comply with the legal requirements pertaining to the manner Appellants are supposed to couch their Notices and Grounds of Appeal. To begin with, as we notice, Order III rule 2(2) requires that if the grounds of appeal allege a misdirection or an error in law, the particulars and nature of such misdirection or error should be clearly stated.

In relation to this sub-rule, it is our observation that in grounds 1, 2, 4, and 6 the Appellant prefixed his appeal grievances with the uniform phrase "*the lower Court erred in holding...*" This style of phrasing grounds of appeal necessarily obscures the question whether the Appellant is appealing on a point of law or on a point of fact. It at the same time gives the Appellant the latitude to, at his convenience, opt whether to project such ground of appeal as based on law or on fact, depending on whether or not he gets cornered about it. Likewise, in ground 3 of the Appellant's grounds of appeal, the Appellant says "*in reaching the conclusion in 1 above the lower Court erred...*" Here too he does not specify if the error was one of law or of fact. In the same style in ground 5 the Appellant says "*in coming to the holding in 4 above, the lower Court erred..*," just as in ground number 7 he laments that "*the lower Court erred in refusing to award interest to the Plaintiff,*" and in ground of appeal number 8 he complains that "*the lower*

Court erred in ignoring the provisions of Clause 20...” As can be seen, in none of these grounds does he classify any of the alleged errors as being either errors of law or errors of fact. Beyond this, even in ground 9 of the appeal, the Appellant carries on with the same ambiguous manner of crafting his grievances by simply asserting that “ *the lower Court erred in awarding costs to the Defendant.*” Here too, he does not commit himself on whether this was an error of law or an error of fact.

It therefore does not come to us with any sense of surprise that, with ambiguity so deeply imbedded in all the nine grounds of appeal, when it came to giving or attempting to give particulars in relation to these grounds of appeal, the Appellant found himself free enough to meander about with great ease. In this regard, ground of appeal number 3 offers ample evidence of the leisurely manouvres the Appellant was able to make in detailing out the particulars of his grievance. He thus, as he thought fit, described some errors as being of law, the others as being errors of fact, while leaving numerous other errors without attachment of any like qualification. As for the other remaining eight grounds of appeal, however, the Appellant did not even bother when giving their particulars, to describe the errors depicted in them as either being errors of law or of fact. It is our conclusion, in the circumstances, that as raised in the Respondent’s complaint, the Appellant’s grounds of appeal have indeed all been couched in such a way that they are either vague or general. As such, under Order III rule 2(4) of the Supreme Court of Appeal Rules, they do not deserve to be permitted, and they are thus open to being struck off, either by way of the Court’s own motion or on the application the Respondent has made before us.

Vis-à-vis Order III rule 2(3) of the Supreme Court of Appeal Rules, which demands the setting forth of grounds of appeal in a concise manner, under distinct heads, and without any argument or narrative, in assessing the grounds the Appellant has brought before us, we have duly borne in mind all the qualities this sub-rule asks for consideration in a notice of appeal. With all these criteria in the forefront of our minds, we have observed that although the Appellant has filed only 9 grounds of appeal, in length they cover not less than eight pages. As it is, these grounds of appeal have been drafted in such hair-splitting fashion that, for instance, ground number 3 of the appeal alone comprises of 29 sub-paragraphs running from (a) to (z) and then (aa) to (cc). In fact this ground of appeal covers almost four out of the eight pages the grounds of appeal in sum total occupy. Also as can be seen, ground 5 of the appeal has a total of 9 sub-paragraphs that virtually cover one full page out of the eight pages devoted to the grounds of appeal.

To be quite candid, talking about grounds of appeal drawn up in this manner, we think it would be quite a joke on our part to agree with the Appellant that they are concise. According to Collins Compact English Dictionary, “concise” means “*brief and to the point.*” To us, the grounds of appeal the Appellant has tabled before us are visibly not brief and to the point. In other words, they are not concise at all. Reading through them, we further find them, contrary to this sub-rule, to contain too much argument or narrative in that they attempt to attack the lower Court’s judgment almost sentence by sentence. Without intending any disrespect, we must say that it has struck us that the grounds of appeal herein

almost read as if they were a page by page or line by line commentary on the lower Court's judgment.

In our judgment, in drawing up these grounds of appeal, the Appellant must have completely gone on a florid that was completely off tangent the spirit and direction of Order III rule 2(3) of the Supreme Court of Appeal Rules. As such the resultant grounds hardly, if at all, portray what could rightly be called reasonable grounds of appeal. For this reason too, independent of the vagueness or generality they portray, under Order III rule 2(3) of the Supreme Court of Appeal Rules they likewise deserve to be struck out.

We hold, therefore, that the Respondent's preliminary objection has been sufficiently justified, and that it thus deserves to succeed. Accordingly, for the reasons we have just given above, the grounds of appeal which the Appellant filed in this matter ought not to be permitted. We strike them all out for being incompetent in terms of Order III rule 2 (2), (3), and (4) of the Supreme Court of Appeal Rules. Ideally, our judgment in this appeal should have ended here. Indeed, had we chosen to hear the preliminary objection separately from the hearing of the substantive appeal, by our current pronouncement on it the need for going into the hearing of the appeal would not have arisen, and we could therefore at this juncture have comfortably retired from the case.

We are, however, mindful that at the outset of the appeal we had decided to simultaneously hear both the arguments for the preliminary objection and the arguments for the substantive appeal. Having thus tasked the parties to expend

their efforts on the substantive appeal even as the fate of the preliminary objection remained unknown, it will only be fair for us to at least utter a few words, either in praise or in condolence, of the lengthy arguments they presented to us on that subject. However, for the avoidance of any doubts we must make it plain that our stance being that by our above determination of the preliminary question in the matter we have already sealed the fate of this appeal, our comments need not be as exhaustive as should have been the case had the appeal qualified to be heard. Our going into the substantive appeal at this stage, therefore, is somewhat academic, and it mainly serves the purpose of satisfying whatever curiosity the parties might be suffering from, in the light of the fact that we all the same heard them argue the appeal in full.

We wish also to say that owing to the fact that appeals like this come to us by way of rehearing (see: Order III rule 2(1) of the Supreme Court of Appeal Rules, and **Mhango vs City of Blantyre** [1995] 2 MLR 381), it was crucial for us to fully revisit the record of the proceedings that took place in the Court below. This was in order that, as we conduct an assessment of the judgment that has been appealed against, we better appreciate the arguments the parties had advanced before us at the hearing of this appeal.

In a nutshell we observed, after so perusing the record, that the Appellant's stand in the appeal was that the lower Court was through and through wrong in all the conclusions it reached when it dismissed his case in full with costs. In backing himself up, we noted that the Appellant quoted extensively from the Trial Judge's analysis and discussion of the evidence in the case, that he also quoted from the

numerous case authorities he felt could be of aid to his case, and that he then reiterated the painstaking efforts he claimed he had expended in a bid to proving his claims in the case. He thus made it clear to us that it was his belief that he must have triumphed over all of the Respondent's denials of liability in the matter and thereby discharged the burden of proof that lay on him. All in all, he consequently expressed deep perplexity at how the lower Court ended up not believing him, and instead branding him as an untruthful witness. Trusting that in the Court below he had soundly and in all respects proved his case, his cry to us was that the lower Court had dismissed the matter on shallow grounds, and that we should therefore reverse that decision.

As against the stand projected by the Appellant, however, we saw the Respondent oppose this appeal with equal zeal and passion. In praying to us for the upholding of the lower Court's judgment, the Respondent made reference to a great number of case authorities which it felt were in support of this stance. It next carried out a detailed exposition of the law on issues of the weight of evidence and the role of Appellate Courts, on the terms of a contract, on the burden and standard of proof in civil cases, on the role of pleadings in civil cases, as well as on the position of the law regarding claims for interest in civil litigation and on the awarding of costs. Following this analysis, the Respondent's cardinal argument was that the Appellant's case was, in its style of presentation at trial, fundamentally speculative, and that it was not at all substantiated with evidence of the quality and quantity to establish it on a balance of probabilities. The Respondent was accordingly convinced that the Court below was right in

dismissing the Appellant's case as it did, with costs. It therefore prayed that this Court should not find any fault with that judgment.

Further, the Respondent seized the opportunity to caution this Court to remember the precarious position in which it stands *vis-à-vis* the position the Trial Court enjoyed on the vetting of the demeanor and the credibility of the witnesses that testified in the matter. It reminded us that whereas the lower Court had had the advantage of seeing and hearing the witnesses that were called live in this case, we have ourselves neither seen nor heard any of them. Much therefore, it said, as we have the power to overturn the Trial Court on its factual findings, we need to exercise restraint, and avoid just rushing with excitement into overturning that Court just for the sake of it. We were, therefore, implored to only take such bold step if we are convinced that it would be just for us to do so.

By way of accepting the wisdom advocated through this caution, we happily note that it is backed by a wealth of authorities from this Court, including the cases of **Barbour, Robb & O'Connor vs Continental Motor Agencies Ltd** [1984-86] 11 MLR 217, **Mahomed vs Leyland Motors Corporation (Mal) Ltd** [1990] 13 MLR 204, and **Steve Chingwalu and DHL International Ltd vs Redson Chabuka and Hastings Mangirani** [2007] MLR 382. Had it become necessary, therefore, that we decide this appeal on its merits, under these authorities we were definitely going to give due weight to the observations and findings of the Trial Judge on the manner he assessed the four witnesses he saw and heard. Our interference on those findings would only have come, if at all, after the due exercise of guarded caution.

Looking at the way the Appellant decided to present his case in the Court below, we must say we are amazed at the courage and/or naivety he displayed in virtually undertaking the mammoth task of proving the case single-handedly. Although it is not compulsory for any claimant to parade more than one witness in any given case, it is our belief that in the light of the nature of the allegations he had made in this case, the Appellant needed more witnesses than just himself to adequately prove them all to the required standard.

Now in this case, even though besides himself the Appellant also called a Mr Frank Kilembe in his support, it is plain from a perusal and scrutiny of that witness' testimony in the Court below that by the end of the day he had left the Appellant alone and in the cold. It will be observed that Mr Kilembe was, in any event, only meant to assist the Appellant on a single aspect of the case, to wit, on the question whether Total Malawi Limited could pay some dealers for short-deliveries of fuel where such claimants could not furnish evidence of counter-signing by the delivering Drivers in respect of such short deliveries. On that issue, it is amply evident from the record that the said witness quite miserably failed to assist the Appellant with any credible evidence. Indeed, he instead ended up supporting the Respondent's (then Defendant's) case. Mr Kilembe, therefore, having proved unhelpful on the aspect of the case he had been called for, and not having been called for any other purpose in the case, in the result this meant that the proof of the whole case in the end solely rested on the shoulders of the Appellant, and on no one else.

From the pleadings the parties had exchanged, which for some reason they kept amending at a disturbingly frequent rate, it is clear that they had joined issue on all of material assertions the Appellant had made in the Court below. This is amply evident from the fact that each time the Appellant amended or re-amended or re-re-amended his claims, the Respondent likewise amended, re-amended, or re-re-amended his defence thereto. The *onus probandi* in this case, therefore, squarely lay on the Appellant to, as Claimant, prove the claims he had brought to the Court, and to do so to the requisite standard i.e. on a preponderance of probabilities. This, however, as we have earlier alluded to was a huge task for the Appellant to undertake alone. We say so considering that his links with the three Filling Stations the allegations were emanating from, even though owned by him, were somewhat casual.

To talk confidently before a Court of Law, and to persuade it about leaking tanks, ill-performing Filling Station equipment, the precision of the recordings of the opening and the closing dip stick readings, the short-deliveries of fuel, and about what was really happening on the ground between the delivering Drivers and receiving attendants etc, required the parading of witnesses from amongst the people that were daily and directly involved in those transactions. It was thus naïve, in our view, for the Appellant to think or believe when testifying in the lower Court that remote or casual as he was as an observer or supervisor of these transactions, he could give that Court as good, if not better, evidence than those who had primary knowledge of everything that was happening at those Filling Stations.

It rather strikes us, therefore, that it is the Appellant who was more handicapped, than those he excluded from testifying, about giving to the Court a raw and convincing picture of what was actually happening on the ground. Regardless of how frequently he tried to be at the material Filling Stations, which were distantly located at Mulanje, Thunga, and Sunnyside, he could not have been at the said Filling Stations every day, full time, and/or simultaneously at all of them. He could therefore not have personally observed everything that was happening there, or witnessed whether the recordings that were being made were indeed matching the readings actually taken. We thus apprehend that even when he so showed up at any of these Filling Stations at times of his choice or convenience, that the Appellant had then to depend either on the reports his employees chose to give him on any occurrences that might have taken place in his absence, or on the face value of records they had already made in his absence, or on both. Much therefore as the Appellant appears to have vested much faith in himself as a principal and reliable witness in this case, he was in truth the weakest link in the chain of those that had knowledge about the case. Having thus chosen to leave out all the stronger links in the existing chain of potential witnesses in this matter, we tend to think that he inflicted mortal injury to his own case. It is no wonder to us that the Trial Judge did not find him at all impressive as a witness, let alone as the main witness in the case.

It was thus not far-fetched in this case for a reasonable Tribunal to conclude, as we would have done, that the Appellant's oversight over his attendants and other staff at the concerned Filling Stations was sporadic and/or intermittent. He was accordingly in no position to vouch to the effect that his servants were ever

honest in all their dealings, especially as they appear to have mostly worked in his absence. As we see it, therefore, the Appellant's evidence in this case was largely merely official and it was also remote. It, as pointed out above, dangerously bordered on hearsay. The Appellant was definitely not the primary source of the evidence he gave. In our observation, what he represented as his own evidence mainly originated from actions done, and records made and maintained, by persons other than himself. Those witnesses, as observed, did not get any chance to personally testify in the Court below on their knowledge and experiences on the issues that were before the Court. The Appellant also testified on what he must have merely heard from such other people, and/or from what may merely have been his understanding of how his Staff were dealing with whoever they might have interacted with, including how they might have dealt with the Drivers that were delivering fuel to the Filling Stations.

To us, therefore, it was great folly on the Appellant's part for him, in the presentation of his case in the Court below, to so heavily depend on evidence he was not the primary source of. The people who operated his Filling Stations, who did the opening and the closing dip-stick readings, who entered what they saw during such readings in the records, who then reconciled what was in the records with what was the true picture on the ground, who also directly dealt with the alleged problems of leaking tanks, leaking pipes, over-throwing pumps and lagging totalizers, and who ordered and received fuel and who thus dealt with the problems of short deliveries of fuel whenever such might have occurred, would in our view have been far better placed to enlighten the Court on those issues than the Appellant ever was. We thus sincerely believe that after personally explaining

their experiences to the Court, had they been afforded the opportunity to do so, the said witnesses could have been in a far better position to withstand cross-examination than the Appellant did when he was cross-examined on his, so to speak, 'borrowed evidence.' Further, even among the Drivers the Appellant alleged had been refusing to counter-sign for short deliveries of fuel, had he bothered to even call just one, the Court could have been far better advised on that allegation than it was with the Appellant posing as a champion of knowledge, when he was neither one of the delivering drivers nor one of the receiving attendants.

Beyond this, yet another fallacy we believe the Appellant committed in the presentation of his case in the Court below was that he chose, despite the *ad hoc* nature of his supervision, to proceed on the premise that all his servants at the three Filling Stations that are in question had been serving him as honestly as angels would have done. He appears to have held such an abiding faith in them, a thing which could easily have been an illusion on his part, that he could not suspect them of any wrongdoing, even when they worked out of his sight and superintendence. The thought that some losses, if any indeed occurred, could possibly have emanated from the conduct of his attendants appears to only have crossed his mind upon that suggestion being made to him during cross-examination.

Prior to that, he appears to have taken it for granted that if anything went wrong at the Filling Stations, then almost as a matter of reflex action it had to be because of fault on the Respondent's part. Like the Court below, we too take the view that

in his persistent inclination to shift all blame to the Respondent for any mishap at his Filling Stations in this case, the Appellant grossly understated the human element in the occurrence of such losses. The evidence he presented to support the blame he so lumped on the Respondent was, as above observed, of poor quality, and it could not have satisfied the standard of proof that was expected of him. As can be seen, therefore, even if we had dismissed the preliminary objection, our conclusion in this appeal would have been that the lower Court had reached a logical conclusion on the case, and that it had properly dismissed the same with costs. We would, in that event, all the same have dismissed this appeal.

As already indicated above, all we have said on the substantive appeal is virtually *obiter dicta*. Our *ratio* in deciding this case is to be found in our determination of the preliminary objection the parties battled over. We have already held that in the manner he couched his grounds of appeal in this case, the Appellant run foul of Order III rule 2(2), (3), and (4) of the Supreme Court of Appeal Rules. He drew up vague or general grounds of appeal, which were needlessly long, full of argument or narrative, and which did not amount to reasonable grounds of appeal. They thus fell short of qualifying as permissible grounds of appeal in this Court. Having already struck them all out, we now dismiss this appeal in full. The Respondent deserves the costs, and so we award it the costs of the appeal.

Pronounced in Open Court the 21st day of October, 2015 at Blantyre.

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HONOURABLE JUSTICE E.B. TWEA SC, JA

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HONOURABLE JUSTICE A.C. CHIPETA, JA

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HONOURABLE JUSTICE L.P. CHIKOPA, JA