IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE
MSCA CIVIL APPEAL NO. 10 OF 2014

[Being Blantyre Commercial Cause Number 148 of 2012]

BETWEEN

WANDIYA THINDWA & HARRY THINDWA T/A WANHAT INVESTMENT ..... APPELLANTS

AND

NATIONAL BANK OF MALAWI LTD ..... RESPONDENT

CORAM: THE HONORABLE THE CHIEF JUSTICE
THE HONORABLE DR JUSTICE J M ANSAH SC, JA
THE HONORABLE MR JUSTICE L P CHIKOPA SC, JA
A. Salimu Mr. of Counsel for the Appellants
Messrs M. Chisanga SC/Dziwani of Counsel for the Respondent
S Minikwa Mr. Court Clerk/Recording Officer

JUDGMENT

Chikopa SC, JA [The Hon. The Chief Justice And Justice of Appeal Dr Ansah SC Concurring]

BACKGROUND

The respondent is a commercial bank registered to conduct such business in Malawi. The appellants are business persons. It is clear that there were some transactions between them that necessitated the appellants putting up one or other of their trucks as security for certain financial accommodations. It is equally clear that there were issues regarding the settlement of such accommodations as a result of which the respondent found it necessary to realise the security. They impounded one of the appellants' trucks. As matters turned out, the respondent

impounded the wrong truck. This was on 6th October 2012. They only released the truck six days later i.e. on 18th October 2012.

The appellants claimed that the seized truck was from 5th October 2012 contracted to Katundu Haulage for the gross monthly sum of MK1,900,000.00 plus VAT for a minimum period of two years. That because of the seizure it was not made available to Katundu Haulage who on October 8, 2012 terminated the said contract thereby occasioning the plaintiff a loss of the gross contract sum of K45,600,000.00.

By an amended writ of summons the appellants claimed from the respondent:

> *'the sum of K45,000,000.00 being the value of the residue of the contract with Katundu Haulage which has been terminated because the defendant illegally seized the plaintiff motor vehicle Man Diesel registration number NA 3685 on 6th October 2012 in an act amounting to illegal interference with contractual obligations; trespass to goods and alternatively conversion; interest on the said amount at ruling bank rates and costs of these proceedings'.* [Sic]

In an accompanying amended statement of claim the appellants claimed from the respondent:

> *'the value of the remainder of the contract between the plaintiff and Katundu Haulage which is K45,600,000.00 interest on the amount 9.1 above costs of these proceedings'.* [Sic]

Courtesy of its judgment dated July 3, 2013 the trial court dismissed the claim in its entirety. The appellants were dissatisfied. They have appealed to this court.

GROUNDS OF APPEAL

They filed five grounds of appeal. We reproduce them verbatim.

1. *'THAT the learned trial judge erred in law in holding that in the tort of illegal interference with a subsisting contract or contractual obligations the guilty party's actual knowledge of the contract between the*

plaintiff(claimant) and the other contracting party was a prerequisite to liability.

2. *THAT the learned trial judge's finding that there was no evidence to support the allegation that the defendant knew, at all material times, that there existed a contract between the Appellant and Katundu Haulage, is glaringly against the weight of the evidence. On the facts it was an error of law for the trial judge to find that such knowledge of the contract was supposed to have been only at the time of illegal seizure of the motor vehicle in issue.*

3. *THAT having made a finding that the defendant indeed wrongfully seized and detained the appellant's truck the learned trial Judge erred in law in not awarding consequential damages in the sum on MK45,600,000.00 for either the tort of trespass to goods or conversion.*

4. *THAT the learned trial judge erred in law in not at all considering the tort of conversion which was part of the Appellant's claim because if he had he would have found that the facts did satisfy all the elements of the commission of the said tort.*

5. *THAT the learned trial Judge erred at law in not awarding damages because general damages had not been pleaded as the same measure of damages for conversion and/or trespass to goods is the value of the asset plus consequential damages which were duly pleaded and proved at trial'.[Sic]*

THE PARTIES' ARGUMENTS

At the outset let us say that we are most thankful for the parties' industry herein. They made available to us case law and arguments that made our task if not easier, then certainly worth the while. We should also state that it is our understanding that the respondent does not, both in this and the trial court, dispute that it wrongfully seized the appellants' truck. Rather the damages payable in respect thereof. Thirdly we must emphasise that we refer to the parties' arguments at this stage from a generalised perspective. We will make

greater, and more specific, reference to them as we consider the grounds of appeal.

The Appellants'

It is the appellants' argument that actual knowledge of a third party contract is not a prerequisite to liability in the tort of interfering with a subsisting contract. In their view it is enough on the one hand that a contract has been interfered with and on the other that damage has thereby been suffered. The immediately foregoing notwithstanding, the appellants also contend that the respondent had, in the circumstances of the instant case, actual knowledge of the contract between itself and Katundu Haulage. It is therefore the appellants' conclusion that the trial court erred in not finding that they are entitled to K45,600,000.00 damages if not for interference with a subsisting contract then most certainly for trespass to goods in the alternative conversion.

They thus pray that this court allows the appeal, awards them the sum of K45,600,000.00 as damages and grants them the costs of these proceedings both in this and the trial court.

The Respondent's

It disputes the above arguments. Much like the trial court it is of the view that knowledge of the third party contract is a necessary ingredient of the tort of interfering with a subsisting contract. That because it was not aware of the appellants' contract with Katundu Haulage when it seized the truck it cannot be liable as alleged or at all.

Secondly the respondent contends that the contract with Katundu Haulage was a sham. No claim in respect thereof as alleged by the appellants is therefore sustainable.

Thirdly, and assuming the said contract existed, the respondent argues that at the material time the appellants were incapable of performing the contract with Katundu Haulage anyway. The seized motor vehicle was not road worthy. It was also simultaneously engaged in another contract with Illovo Sugar [Mlw] Ltd to haul sugar from Dwangwa to Mzuzu.

Lastly, but by no means least, the respondent thinks the appellant should have mitigated their damages. And that not having done so they should not be allowed to claim K45,600,000.00 as damages.

The respondent therefore prays that the appeal be dismissed in its entirety with costs.

THE COURT'S CONSIDERATIONS OF THE ISSUES

We think this matter can best be resolved by answering the following questions: Firstly whether actual knowledge of a third party contract is a necessary ingredient of the tort of illegal interference with a subsisting contract; secondly, and assuming the answer to the first question is in the positive, whether the respondent herein had, at all material times, actual knowledge of the contract between the appellants and Katundu Haulage; thirdly whether, upon finding that the respondent wrongfully seized the appellant's truck, the trial judge erred in law in not awarding the sum of K45,600,000.00 as consequential damages for trespass to goods or conversion; fourthly whether the trial court erred in law in not, on the facts, considering the tort of conversion and awarding damages therefor; and finally whether the trial court erred in not awarding general damages for trespass to goods in the alternative conversion.

This court will, in answering the above questions, proceed by way of rehearing. We will ask ourselves the question whether on the facts and law before the trial court we would have come to a conclusion different from that which was arrived at by the said court. If the answer be in the positive the appeal will have succeeded. If it be otherwise it will have failed.

Whether Actual Knowledge Of A Third Party Contract Is A Prerequisite Of The Tort Of Illegal Interference With A Subsisting Contract?

Both parties' starting point was the case of **Lumley v Gye** (1853) 2 E & R 216 and Lord Mac Naughten's sentiments in **Quinn v Leatham** [1934] P. 189. It just so happens that they came to different conclusions.

On our part the law is clear enough. The tort is not just about the act of interfering with another's contract. The interference should in our judgment also

be intentional, without justification and with knowledge on the interferer's part not only that their action[s] will interfere with the other's contract but also that such interference will result in that other party suffering loss/damage. To the question 'is actual knowledge of the third party's contract a prerequisite of the tort of illegal interference with a contract'? our answer is in the positive.

If actual knowledge was not a requirement the tort would turn into one of strict liability. That would give rise to injustices and absurdities clearly not contemplated by those that birthed the tort. One can easily imagine the ensuing havoc if all acts, even innocuous ones, attracted tortuous liability merely because they interfered or had the effect of interfering with a victim's even unknown subsisting contracts.

Did The Respondent Have, At The Material Time, Actual Knowledge Of The Contract Between Katundu Haulage And The Appellants?

The crucial question in our view is 'what is the material time'? The question needs, in our judgment, to be addressed at two levels. Generally and with specific reference to this case.

With respect to the former the material time has to be the time at which the contract is **actually interfered with [our emphasis]**. Such time is a matter of fact and will vary from case to case.

In the instant case the respondent thinks that the material time is the time at which the truck was actually seized. That such being the case, and much as it is undeniable that the truck was wrongfully seized, it i.e. the respondent, was never aware, indeed could never have known, of the contract allegedly existing between the appellants and Katundu Haulage.

The appellants have a different view. They think the material time was fluid. It started with the seizure of the truck and carried on until and up to the point in time when, on October 8, 2012, Katundu Haulage terminated the alleged contract. While they are therefore willing to agree that the respondent may not have been aware of the contract with Katundu Haulage on the point of the truck's seizure they have no doubt that the respondent was, around the time of Katundu

Haulage's termination of the alleged contract, aware of the said contract courtesy of an email message dated October 6, 2012 timed at 10.19pm from Harry Thindwa to Weston Chiwanda an employee of the respondent. The appellants' argument is therefore that the respondent actually knew at the material time that any continued detention of the truck would interfere with the plaintiffs' contract with Katundu Haulage. That the said contract having been thereby and in those circumstances terminated the respondents should be liable for any resultant loss.

The trial court was of the respondent's view. On page 3 paragraphs 2 and 3 of its judgment it found that the material time was that at which the truck was seized; that the defendant was not at that time aware of any contract between the appellants and Katundu Haulage; and therefore that it could not have intentionally interfered with the same. The trial court accordingly refused to find the respondent liable for interfering with any contract between the appellants and Katundu Haulage and dismissed the appellant's case with costs.

We must largely disagree with the respondents and the trial court. And we will soon show why. Whereas it is possible for interference to be achieved via a single act or omission the same can also be achieved via a series of acts or omissions or one continuous act or omission that either interferes or has the effect of interfering with another's contract. Using the instant case as an example, it is obvious that the alleged contract was not cancelled immediately the truck was seized. Rather it was **the seizure and continued detention thereof** [our emphasis] that allegedly resulted in the cancellation of the said contract. If we should therefore talk about the respondent's knowledge of the Katundu Haulage contract the question is no longer whether the respondent actually knew of the alleged contract on the date the truck was seized. It is 'whether or not the respondent knew of the alleged contract at or around the time Katundu Haulage cancelled the same'.

The appellants pointed to the email from Harry Thindwa to Weston Chiwanda and answered the question in the positive. We agree with them. The respondent was, subject to our findings and conclusions hereinafter, aware of the alleged contract at or around its cancellation. They must also have known that any continued detention of the seized truck would interfere with it.

Did the Trial Court Err in Not Awarding The Sum of K45,600,000.00 as Consequential Damages?

The appellants advanced two arguments in support of a positive answer. Firstly that this sum should have been awarded in the trial court as a matter of course upon the respondent admitting that the truck's seizure was wrongful. Secondly that the trial court should, in the alternative, have awarded the damages in respect of trespass to goods or conversion seeing as a case was on the facts made out for trespass to goods and/or conversion.

The respondent answered the question in the negative. They advanced three arguments in support of their position. Firstly they contend that the Katundu Haulage contract never in fact existed. It was a sham. The questions of interference with it, knowledge thereof and consequential damages does not therefore even arise. In the alternative the respondent contends that the appellants could not have executed the contract anyway the truck's seizure notwithstanding. The truck was not only simultaneously contracted to Illovo Sugar [Malawi] Ltd but also not roadworthy. Its seizure and detention was therefore a nonissue. It could not have resulted in the appellant suffering any loss.

Secondly, the respondent contends that the claimed damages are not payable for not being foreseeable. One cannot foresee damages arising out of a sham contract or one that is incapable of execution.

Thirdly the respondent argues that the appellant not having mitigated their alleged loss should not be allowed to claim the sum of K45,600,000.00 as consequential damages.

On the evidence before us it is not in dispute that at the time of seizure and detention the truck was executing a one year contract with Illovo Sugar[Malawi] Limited hauling sugar from Dwangwa to Mzuzu. It was required to make four trips per month to Mzuzu from Dwangwa. The said truck, a van, was at this time also damaged. The poles supporting the housing were damaged rendering it not immediately usable. It actually had to be repaired on release before picking up more sugar at Dwangwa destined for Mzuzu. Equally not disputed are the facts that at the time of seizure, i.e. on 6th October 2012, the truck had just offloaded

timber hauled from Mzuzu at Senga Bay in Salima and was on its way to Dwangwa to pick up sugar for delivery in Mzuzu; that the alleged contract with Katundu Haulage was to commence on 5th October, 2012 and that the truck had to be with Katundu Haulage not later than October 7th, 2012.

Certain inferences and conclusions are inevitable in the circumstances. Firstly if the one truck was simultaneously contracted to Katundu Haulage and Illovo Sugar [Malawi] Ltd it was a physical impossibility that the said truck would be able to execute both contracts. Such a physical impossibility Mr Harry Thindwa could not have been entirely honest when he contended that the Illovo contract did not preclude the truck from being deployed with Katundu Haulage indeed that the Illovo contract did not kill off the Katundu Haulage contract. Or vice versa.

Secondly it is strange, to say the very least, that this very truck that was contracted to Katundu Haulage for two years from October 5th, 2012 and had its operational base on the Nacala Corridor was on the date of seizure i.e. October 6th destined for Dwangwa from Senga Bay, Salima to load sugar for shipment to Mzuzu. Can it be said that it was proceeding towards commencing execution of the Katundu Haulage contract? We have serious doubts. Is it possible that this same truck could have been repaired, loaded sugar at Dwangwa, driven to Mzuzu, offloaded the sugar and still made it to Katundu Haulage before the expiry of October 7th, 2012? We have even more serious doubts. So serious it is our most considered view that the appellants could not have been telling the truth when they alleged that there was a contract between the appellants and Katundu Haulage in relation to the truck commencing on October 5th, 2012.

The truth of the matter is that one of the contracts had either to be cancelled or could not be executed. Or just did not exist. In the presence of evidence showing that the Illovo contract existed and was up and running the alleged existence of the Katundu Haulage contract notwithstanding, the only other conclusions are obvious enough: the Katundu Haulage contract was a sham, did not exist and was, in the unlikely event that it did exist, clearly incapable of execution the appellants' truck's seizure and detention notwithstanding. The document tendered in the trial court as Exhibit AB2 was, we must sadly conclude, nothing more than a concoction concocted for purposes of facilitating this action. We must therefore

agree with the respondent's contentions that the contract between the appellants and Katundu Haulage did not in fact exist; was a sham; incapable of execution by the appellants; and that Exhibit AB2 was produced to specifically facilitate this action.

The trial court did not err in declining to award consequential damages for illegal interference with a subsisting contract, conversion or trespass in the sum of K45,600,000.00. Such an award was dependent on the existence of a contract, capable of performance, between the appellant and Katundu Haulage. The facts have shown that such was not the case at all. There was thus nothing to interfere with. The question of foreseeability and consequential damages, needless to say, does not even arise.

We will comment on the issue of mitigation. But only by way of *obiter*.

It is not in our view enough, in relation to mitigation, for a defendant merely to allege that a claimant did not take measures to mitigate their losses upon being put in adversity. The defendant should show, on a balance of probabilities that the claimant was in a position to mitigate but did not, for some clearly untenable reason, do so. Then, and only then, would a court be justified in taking such fact into consideration in determining the *quantum* of damages awardable to the victim party. Otherwise it appears to us indefensible for a defendant to, as was the case herein, take away someone's means of economic advancement and then refuse to, in the absence of proof that the claimant had capacity to do so, sufficiently reparate by claiming that the claimant did not mitigate their losses.

Did The Trial Judge Err In Law In Not Considering The Tort Of Conversion?

If we may the appellants' contention is that despite pleading conversion the trial court never considered it. That had it done so it would, on the evidence before it, have come to the conclusion that the said tort was proven and would then have been obliged to award the sum of K45,600,000.00 above-mentioned.

The respondent disagrees. It essentially repeats the arguments raised above namely that the loss was not foreseeable because the said contract was a sham

and incapable of execution by the appellants. That the appellant could not have lost anything the alleged conversion notwithstanding.

Going through the trial court's judgment it is obvious that conversion, even though pleaded, was not specifically dealt with by the trial court. To that extent we agree that the trial court erred. But like we have said hereinbefore we are proceeding herein by way of rehearing. Our role therefore is not just to find that the trial court erred. It is to do that which the trial court should have done but for the error.

Legally conversion involves dealing with another's goods in a manner that deprives the latter of possession or use thereof. One therefore commits conversion by wrongfully taking another's goods, wrongfully disposing of them, wrongfully misusing them, wrongfully destroying them or simply wrongfully refusing to give them up on demand.

On the facts before us there is no denying that conversion was converted. The only question therefore is that of the damages payable.

The question of damages for conversion was, in our view, settled by Unyolo J[as he then was] in **Chiwaya v SEDOM** (1991) 14 MLR 47 at 55 as follows:

> *'this court has persistently followed the law laid down in **General and Finance Facilities Ltd v Cook's Cars (Romford) Ltd** [1963] 2 All ER 314 where it was held that damages in an action for conversion is for a lump sum of which the measure is generally the value of the chattel at the date of conversion, together with any consequential damage flowing from the conversion and not too remote to be recoverable in law'.*

The learned Editor of Winfield and Jolowicz 17th edition is much of the above view. At page 777 he opines that the '*judgment for damages will be for the value of the goods at the time of the conversion together with any consequential loss which is not too remote because that represents what the claimant has lost*'.

Applying the above to the instant case the sum of K45,600,000.00 is only claimable if it is either the value of the truck at the time it was converted or if it is not too remote a consequential loss. The question being is it either?

We have perused the pleadings and considered the evidence. Nowhere was it suggested that the value of the truck was at any one time K45,600,000.00. The appellants cannot therefore claim, indeed be awarded, the sum of K45,600,000.00 as damages for conversion. But even assuming that the truck was worth K45, 600,000.00, which it was not, we doubt whether the appellants can be rightfully awarded that amount as damages for conversion. The truck was restored to the appellants on October 18th. An award of K45,600,000.00 assumes the total loss of the truck which is not the case in the instant suit. It would not be a jurisprudentially sound court that awarded K45, 600,000.00 as damages for conversion on the present facts.

The matter of consequential loss has already been disposed of above. The Katundu Haulage contract is, with respect, a sham, did not exist and was incapable of execution the seizure and detention of the truck notwithstanding. The appellants could not therefore have suffered loss on the basis of a nonexistent contract or one which they could not have performed anyway.

The trial court erred in not considering the tort of conversion. It is however an inconsequential error.

Did The Trial Judge Err In Not Awarding General Damages For Trespass To Goods And/or Conversion?

The trial court refused to award general damages for trespass to goods and/or conversion. In its view the same was not pleaded. It therefore thought it improper to award damages in respect of a claim not before it.

The appellants think the trial court thereby erred. General damages for trespass to goods or conversion were in this matter so embedded in the claim for consequential damages there was no need for them to be specifically pleaded. This according to the appellants is so rudimentary and obvious it explains why the respondent never raised it in the court below.

We must disagree with the appellants. Our system of civil litigation is adversarial. Issues are determined not by the court but by the parties themselves via *inter alia* pleadings. The court only plays the part of an independent and impartial arbiter.

The court must never descend into the battlefield lest the din and dust of war interferes with its impartiality and independence.

In the instant case our appellants chose not to claim general damages. Having done so we fail to appreciate how they expected the trial court to, of its own volition, grant them relief they deemed not necessary to ask for. Had the trial court done so it would have thereby risked abandoning its position as an independent and impartial arbiter for the battlefield. The trial court in our judgment proceeded properly in declining to award the appellant general damages herein.

DETERMINATION/CONCLUSION

In the final analysis and referring to the appeal before us it is our conclusion that actual knowledge of a third party contract is a prerequisite to liability in the tort of illegal interference with a subsisting contract.

Secondly, and while we agree with the appellants that the respondent was, at or around the time Katundu Haulage cancelled the alleged contract aware of the said contract it is also clear in our judgment that the Katundu Haulage contract did not exist, was a sham and incapable of execution by the appellants. The appellant could not therefore have suffered any loss/damage courtesy of the respondent's seizure and detention of the truck in issue. Loss can never flow from a nonexistent contract. Or one that is incapable of execution. The trial court was therefore within its rights not to award the appellants the sum of K45,600,000.00 as damages, consequential or otherwise for illegal interference with a subsisting contract, trespass to goods or conversion.

Thirdly, and again while we agree that the trial court erred in law in not considering the matter of conversion despite the same having been pleaded, argued and proven, our view is that the error is inconsequential. The trial court could not have, just as we will not, awarded the sum of K45,600,000.00 as damages for conversion. The sum of K45,600,000.00 is neither the value of the truck nor its diminution in value following the conversion.

Lastly it is also our view that the trial court did not err in not awarding general damages for trespass to goods and/or conversion. It was not pleaded. And it is not the business of courts to award reliefs that have not been pleaded.

The appellants' appeal is therefore dismissed in its entirety.

COSTS

They are in the discretion of the court. In due exercise of such discretion we award them to the respondent both in this and the trial court the same to be taxed if not agreed.

Delivered in open Court this 11th day of July 2016 at Blantyre.

THE HONOURABLE THE CHIEFJUSTICE

DR. J M ANSAH SC

JUSTICE OF APPEAL

L P CHIKOPA SC

JUSTICE OF APPEAL