REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NO. 59 OF 2019

(Being High Court, Commercial Division, Blantyre, Commercial Case No. 314 of 2016)

BETWEEN:

NATIONAL BANK OF MALAWI PLC.....APPELLANT

AND

ADAM H OSMAN .....RESPONDENT

CORAM: HON. THE CHIEF JUSTICE R.R. MZIKAMANDA SC, JA

HON. JUSTICE L.P. CHIKOPA SC, JA

HON. JUSTICE F. E. KAPANDA SC, JA

HON. JUSTICE H.S.B. POTANI JA

HON. JUSTICE J. KATSALA JA

HON. JUSTICE I.C. KAMANGA JA

HON. JUSTICE M.C.C MKANDAWIRE JA

Mwangomba of Counsel, Counsel for the Appellant

Katuya, Counsel for the Respondent

Shaibu, Judicial Research Officer

Ms C Masiyano, Court Clerk

Dates of Hearing: 29 July 2020

Date of Judgment: 28 October 2021

ANNOTATIONS

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JUDGMENT

Judgement delivered by The Honourable the Chief Justice R.R. Mzikamanda SC, JA:

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also allow the appeal. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

.....

THE HONURABLE THE CHIEF JUSTICE R.R. MZIKAMANDA, SC, JA

Judgement delivered by Justice L.P. Chikopa SC, JA:

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also allow the appeal in the manner put in the judgment of this Court as set out above. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

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HONOURABLE JUSTICE L.P. CHIKOPA SC, JA

Kapanda SC, JA:

INTRODUCTION

This is an appeal against the judgment of the Court below. ` This matter was first brought in the Commercial Division of the High Court by the Respondent by way of an Originating Summons. The Respondent was seeking, inter alias, several declarations regarding his purchasing from the Appellant of a motor vehicle Registration number CK 4868, a Nissan UD 95. Trial was heard by Justice Sikwese who delivered her judgment in the matter on 26 April, 2017.

By its judgment dated 26 April, 2017, the court a quo adjudged the Appellant liable to pay the Respondent damages for breach of contract for non-delivery of a motor vehicle registration number CK 4868 Nissan UD 95 truck purchased by the Respondent from the Appellant under a contract evidenced by an advert in *The Nation* Newspaper of Monday, 10 October, 2016, a letter from the Respondent to the Appellant dated 14 October, 2016 and a letter from the appellant to the respondent dated 21November, 2016. The appeal before this Court is against the said judgment in its totality.

The thrust of the Appellant's case in this appeal, based on the amended notice of appeal and its skeleton arguments on appeal, is that the court below erred in (1) awarding the Respondent the sum of K24,500,000 as damages for the apparent breach of contract when, evidently, the Respondent never pleaded for payment of that sum; (2) using the price of a brand new vehicle as a benchmark for measuring damages and; (3) awarding costs of the action to the Respondent.

FACTUAL BACKGROUND

In or about October, 2016 the Appellant sought to sell a used motor vehicle registration number CK 4868 by way of recovery of money owed by a customer who was not servicing her account with the Bank. The Appellant reserved the price of K 20,000,000. 00 for the said motor vehicle. The Respondent offered to the Appellant to buy the motor vehicle at the price of 20,500,000.00 to which the Appellant communicated its acceptance on the 21November 2016. The Appellant accepted the offer and the Respondent proceeded to make payment by instalments. In the said

letter of acceptance was a term where the Appellant stated that it would issue a letter authorizing change ownership of the truck upon the payment of the said K 20,500,000.00 and the said money was to be paid within a seven-day period which the Respondent did. However, before completion of the sale the owner of the vehicle paid the sum due on her account and the Bank released the vehicle to her. By reason of this the Appellant was not able to deliver the vehicle to the Respondent and offered to refund the money he had paid plus interest. The Respondent rejected the offer made by the appellant and insisted that he be given the truck. It is the Appellant's refusal or failure to deliver the truck to the Respondent that gave rise to the action in the lower court for an order of specific performance or, in the alternative, an order for payment of general damages for breach of contract and costs of the action.

By Originating Summons dated 14 December, 2016 the Respondent commenced action against the Appellant seeking, inter alia, an order for specific performance or, in the alternative, general damages. The Appellant duly filed an affidavit in opposition against the Originating Summons.

By judgment dated 26 April, 2017 the Judge ordered that the Respondent be paid the sum of K24,500,000 as damages for breach of contract. This sum is the difference between the price of a brand new vehicle of the similar nature and contract price of the aborted contract in this matter. The Judge made this order notwithstanding that what was being sold to the respondent was a second hand vehicle and not a brand new vehicle.

The Appellant refunded the purchase price of K20,500,000 paid by the Respondent and also paid the sum of K24,000,000 ordered by the court. Being dissatisfied with the judgment the appellant filed this appeal.

It must be noted that hearing of Originating Summons was conducted in chambers in line with rules applicable at the material time. The Appellant was dissatisfied with the decision of the Court a quo and appealed to this Court. The Appellant did not seek and obtain leave to appeal. This Court, after the appeal had been entered, directed on 22 February, 2021 that the Appellant should obtain leave to appeal. The relevant part of its Order reads as follows:

> "In terms of the second proviso to section 21 of the Supreme Court of Appeal Act your case requires leave to appeal as the impugned judgment was made in Chambers. Therefore, the case has been removed from the cause list until you comply with what the law requires."

The Appellant proceeded to file application for leave to appeal in this Court. However, the registry advised that the application be made in the Court below. The appellant filed a miscellaneous application in the Court *a quo* and obtained the order for leave to appeal.

THE GROUNDS OF APPEAL

The Appellant filed notice and nine (9) grounds of appeal. The following are the said grounds of appeal:

1. The learned Judge erred in law and fact in awarding the Respondent special damages when according to the Origination Summons the respondent pleaded to be awarded general damages for breach of contract;

2. The learned Judge erred in law and fact in a warding the respondent the sum of 24,500,000.00 when the respondent never pleaded for payment of this sum;

3. The learned Judge erred in law and in fact in awarding the so called difference between the contract price of the aborted contract price of the aborted contract and cost of buying a substitute vehicle when such damages were never pleaded by the respondent;

4. The learned Judge erred in law and fact in using the price for buying a brand new vehicle as a benchmark for measuring damages when the vehicle that was being sold to the Respondent did not proffer evidence to prove that the price of such a second hand vehicle was higher elsewhere;

5. The learned Judge erred in law and fact in awarding the Respondent a quantum of damages that is based on purchase of a brand new truck and the Respondent had not provided evidence to prove that he could not manage to get a similar or indeed any other second hand truck for use in his business;

6. The learned Judge erred in law in refusing the Appellant's prayer that damages be assessed latter in view of the fact that the respondents had pleaded for general damages and the parties needed to properly guide the court on appropriate quantum of damages;

7. The learned Judge erred in law when she refused to give the Appellant an opportunity to be heard on the correct quantum of damages to be awarded to the Respondent;

8. The learned Judge erred in law in over compensating the Respondent; and

9. The learned Judge erred in law in awarding the respondent all of the action when a substantial part of his case had been dismissed by the court

What are the issues that arise and fall to be decided in the appeal under consideration by this Court? The issues for this Court's determination are, essentially, as raised in the Appellant's grounds of appeal itemised above. Further, there are issues that arise upon analysing the arguments presented by the parties in their oral and written submissions.

ISSUES FOR DETERMINATION

As this Court understands it, the questions raised by the appeal are as follows:

1. Whether or not the court below awarded any special damages to the Respondent and whether the sum of K 24,500,000.00 awarded to the Respondent as damages was an award of special damages as alleged in sub-paragraph 3(a) and (b) of the appellant ground of appeal;

2. Whether or not the Respondent ought to have pleaded the difference between the contract price of the truck and the cost of buying substitute vehicle as alleged in sub-paragraph 3(c) of the grounds of appeal when the same is only a formula for determining the measure of general damages for breach of contract of sale of goods;

3. Whether or not the Judge erred in law or in fact in issuing the price of a brand new vehicle as a benchmark for measuring damages payable to the respondent as alleged in sub paragraphs 3(d) and (e) of the grounds of appeal;

4. Whether or not the Respondent was over compensated in any way as alleged in Sub- Paragraph 3 (h) of the grounds of appeal;

5. Whether or not the Judge erred in granting a relief that was not pleaded by the Respondent;

6. Whether or not the Judge erred in awarding special damages the same having not been pleaded by the Respondent; and

7. Whether or not by her judgment the Judge unjustly over-compensated the Respondent.

Further, there is an ancillary issue whether leave should have been obtained in this matter. Put differently, whether in appeals requiring leave of the Court such leave may be validly obtained after the appeal is already entered in this Court.

It is now necessary that this Court should look at the arguments that have been raised by the parties in response to these questions. We shall start with the Appellants' arguments then move on to deliberate those put forward by the Respondents.

THE PARTIES ARGUMENTS

The Appellant's

Respecting whether leave should have been obtained in this matter, it is the submission of the Appellant that, for the requirement for leave as a condition to appeal provided under section 21 of the Supreme Court of Appeal Act, it is important to note that both the Supreme Court of Appeal Act and Supreme Court of Appeal Rules do not prescribe time within which one may apply for or obtain leave to appeal. It then further drew this Court's attention to Order III r3 (2) of Supreme

Court of Appeal Rules and argued that the provision allows a party to file a notice of appeal even before leave to appeal is obtained. Therefore, it continued to argue, a correct reading of section 21 of the Supreme Court of Appeal Act as read together with Order III rule 3 of Supreme Court of Appeal Rules leave to appeal may be obtained at any stage of the proceedings but before hearing of the appeal is set down. It is further submitted that O.III rule 3 of the Supreme Court of Appeal Rules does not prohibit filing of a notice of appeal even where hearing of application for leave is pending.

On the substantive appeal, in particular with regard to pleadings, it is argued and submitted by the Appellant that, parties are bound by their pleadings and that the court can only decide cases as pleaded by parties. The Appellants continued to submit that in actions commenced by Originating Summons the reliefs are pleaded in the Originating Summons. It is further submitted that the Respondent did not plead payment of the sum of K24,500,000 that the court awarded him. Thus, the award should be set aside.

The Appellant submitted that the position at law is that special damages must be specially pleaded and specially proven. It continued to argue that in the matter at hand the Respondent pleaded general damages and the that this pleading was neither withdrawn nor amended. Therefore, it added, the Respondent was bound to claim for general damages. Thus, in the view of the Respondent the court erred in proceeding to award the Respondent special damages in the sum of K24,500,000 that were never pleaded.

Further, the Appellant submitted and argued that the Respondent unjustly over compensated. It is contended by the Appellant that the Respondent pleaded that he be awarded general damages but that in the supplementary affidavit in support he prayed that he be awarded the sum of US$60,000 being price for a brand new Nissan UD95. The Appellant added that the Judge proceeded to use price of brand new vehicle as basis for measuring damages in this matter and awarded the Respondent the sum of K24,500,000.

The long and short of it is that the Appellants submit that although it is correct that there was breach of contract there was however no proof of damage beyond a refund of the purchase of K20,500,000 that had been paid by the respondent. It added that this would be a proper case where nominal damages should have been ordered by the honourable Judge.

The Respondent's

The Respondent, submitting on the substantive appeal, argued that the sum of K24,500,000 that the lower court awarded to the Respondent was not an award special damages but it was rather an award of general damages calculated in accordance with section 51 (3) of the Sale of Goods Act which he contended is also the formula for the measure of damages at common law where there is an available market for the goods. It was the further submission of the Respondent that in the present case, the court below assessed general damages for breach of contract by the Appellant for failing or refusing to deliver the contracted truck by calculating the difference between the market price of the truck and the contract price. The Respondent continued to argue that since general being the sum of K24,500,000 (which is the difference between the market price and contract price) damages, it did not have to specifically plead that sum of money as contended by the Appellant. The Respondent therefore submitted that there was absolutely nothing wrong either in fact or in law with the manner in which the Judge dealt with the matter when assessing compensation as the Judge dealt with the matter according to the applicable legal principles.

It is the Respondents further assertion that given that what was available at CFAO Malawi was the near equivalent or substitute for the truck that the Appellant had contracted to sell to the respondent, the court below was perfectly entitled to use the market price as was quoted by CFAO Malawi as the benchmark when assessing general damages payable to the Respondent for the Appellants failure or refusal to deliver the Truck. It is the Respondents submission that the judge in the court below duly found the evidence that the substitute or near equivalent for the truck herein was the one that was being sold by CFAO Malawi. The Respondent quoted the Judge a quo in the court below where she stated:

> "in the present case the plaintiff prayed for MK24, 500,000.00 as adequate and appropriate compensation to enable him to buy a substitute motor vehicle whose features closely resemble the motor vehicle he would have had, had the defendant preformed their part of the contract. In the absence of any material to the contrary, the court finds that the plaintiff has made out his case. The plaintiff is awarded MK 24, 500,000.00 as damages for the breach of contract."

It is the Respondent's further submission that there was absolutely nothing wrong in fact and in law in the way that the judge in the court below dealt with the matter when assessing compensation. It is the Respondent's assertion that the judge dealt with the matter according to the applicable legal principles.

THE LAW AND DISCUSSION (Analysis of the law and determination)

Leave to appeal

The question of leave to appeal was raised by this Court. The parties were allowed to address us on the point wjethere or not leave should have been obtained. The relevant provisions that have informed this Court are Section 8 read together with sections 21 and 27 of the Supreme Court of Appeal Act and Order III, rules 3 and 19 well as Order V, rule 1 of the Supreme Court of Appeal Rules. It is the understanding of this Court that a correct reading of section 21 of the Supreme Court of Appeal Act as read together with Order III rule 3 of Supreme Court of Appeal Rules shows that leave to appeal may be obtained at any stage of the proceedings but before hearing of the appeal is set down. It is also important to note that Order III rule 3 (2) of Supreme Court of Appeal Rules allows a party to file a notice of appeal even before leave to appeal is obtained. Further, this Court has on numerous occasions emphasized that where leave to appeal is required for a party to appeal and the appeal is had without such leave such appeal is incompetent. In ***Daurice Kanjedza Nyirongo v Council of Mzuzu University*** [1] this Court said:

> "It is our finding that the appellant did not seek leave as required, to appeal to this court. We therefore find that the appeal is not competently before us._ This appeal therefore, is dismissed. (emphasis supplied).

As this Court understands it, from a reading of the above-quoted provisions, there is no doubt that the Appellant needed the leave of either the court below or this Court to appeal against the judgment of the court below as the proceedings were held in chambers and judgment appealed from was also made in chambers. Further, this Court is of the view that the use of the term, "order"

[1] MSCA Civil Appeal No. 24 of 2018 (unreported); see also ***Malawi Revenue Authority v Laura Kandulu*** MSCA Civil Appeal no.51 of 2016) ***(unreported)***.

in paragraph (c) of the second proviso to section 21 does not exclude a judgment or ruling. We are of the further view that the three terms "judgment", "ruling" and "order" are sometimes used interchangeably although there are some nuanced differences between them. It is well to add that a judgment is, strictly speaking, a final decision of the court on the main action after full trial. And, that a ruling is a decision of the court on an interlocutory or interim application (that is, on an application within the action) whereas an order is an edict by the court compelling a party to do or to refrain from doing something. In the further opinion of this Court, a judgment or a ruling may or may not contain an order within it. Furthermore, the judgment or ruling may simply be declaratory of a legal or factual position. Thus, it is not useful to draw any distinctions between those three terms and to hold that since paragraph (c) of second proviso to section 21 uses the term "order", then a judgment or ruling is excluded. It does not follow that a court's decision made in chambers which is labelled as a judgment, whether final or interlocutory, or as a ruling, is excluded from the rubric, "order". The judgment appealed from in this case was a final judgment made in chambers and it contained two orders: an order for payment of a sum of money and an order for costs. Thus, one cannot completely divest an order from a judgment or a judgment from an order. This Court therefore finds and concludes that the Appellant appealed against the orders made in a judgment which was made in chambers. Therefore, it appealed against orders made in chambers.

It is well to note that, apart from requiring that a party obtain the leave of this Court or the court below before appealing in instances set out in paragraphs (a) to (e) of the second proviso to section 21, neither section 21 nor any other section in the Supreme Court of Appeal Act has specified the timelines when either this Court or the court below may exercise its jurisdiction to grant leave to appeal. Based on that fact alone, it is debatable that both the court below and this Court may exercise the jurisdiction at any time should circumstances so permit. However, under the Supreme Court of Appeal Rules it is clear that there is a time limit within which the court below may exercise the jurisdiction to grant leave to appeal. Under Order III, rule 19 of the Supreme Court of Appeal Rules, once the appeal has been entered, from that time until it has been disposed of, all applications in the appeal must be made to this Court and not to the court below. Thus, once the appeal has been entered the court below no longer retains any jurisdiction whatsoever to entertain an application for or grant leave to appeal against its decisions. Accordingly, the court below acted outside its jurisdiction in granting leave to appeal way after the appeal had been entered. It further follows that the leave that was granted by the court below was a nullity and that, therefore, the

appeal was incompetent. The fact that when the Appellant reportedly filed an application in this Court and they were allegedly "guided by this Court's registry staff to file the application in the court below" would not have saved the day as that would not have been enough to confer the court below with jurisdiction. Jurisdiction is a matter of law. It cannot be created or conferred by agreement, either of the parties or the court itself.

The preceding observations do not dispose the issue of leave to appeal in this matter. In saying this, the Court is alive to the fact that in the opening line of section 21 and in the second proviso of the Supreme Court of Appeal Act, there is a subtle requirement that before appealing or before filing an appeal, there must be in place the leave of the court below or the leave of this Court. That is the conclusion that one arrives at when one takes a common-sense approach in interpreting those provisions. Accepting this view means that a party cannot appeal if they have not been permitted to appeal prior to filing the notice of appeal. Thus, the timing for applying for leave to appeal is intrinsically embedded in the wording, "no appeal shall lie without the leave…". It means that there cannot be an appeal before the leave to appeal is granted. Indeed, Order III, rule 3 sub rule (2) of the Supreme Court of Appeal Rules provides that "if leave to appeal is granted by the Court or by the court below the appellant shall file a notice of appeal". This lends credence to the view that the granting of leave to appeal must precede the filing of the notice of appeal and filing the notice of appeal before the leave to appeal is granted by the relevant Court is a filing of an appeal without the leave of the relevant Court. However, there is an exception provided for in the proviso to sub rule (2) of the Supreme Court of Appeal Rules. It is that an appellant may file a notice of appeal prior to the hearing of an application for leave to appeal.

However, what is noteworthy from the proviso to sub rule (2) of the Supreme Court of Appeal Rules is the fact that for the exception to the requirement to have the leave first to apply the notice of appeal should be filed "*prior to the hearing of the application for leave to appeal*". As this Court understands it, had the Rules intended that the notice of appeal may be filed even before the application for leave is filed, the proviso would have provided that 'nothing in the sub rule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the filing of the of the application for leave to appeal'. But the proviso does not say that. Instead it says that prior to the hearing of the application for leave to appeal meaning that when filing a notice of appeal before the leave is granted, as an exception, there must be in place an application for leave to appeal which

is pending a hearing. Under that exception, the application for leave must have been filed before filing the notice of appeal. As it were, since in this case the notice of appeal was filed before the leave was granted or before any application for leave to appeal was filed, the appeal might be a nullity. Now, if this observation were right, it would mean that there would be no room for either the court below or this Court to entertain an application for leave to appeal or to grant leave to appeal way after the appeal has been entered. In point of fact, it would mean that the applications envisaged under Order III, rule 19, of the Supreme Court of Appeal Rules, which must be made to this Court after the appeal is entered do not include applications for leave to appeal because an appeal would have been filed without there being leave to do so in the first place or without there being an application for leave to appeal pending a hearing as envisaged by the proviso to sub rule (2) of Order III, rule 3 of the of the Supreme Court of Appeal Rules.

This Court is of the view that an interpretation of the second proviso to section 21 and Order III, rule 3 sub rule (2) of the Supreme Court of Appeal Rules and the proviso thereto as advanced above is too restrictive. It would be reading too much into a phrase that does not expressly say that the leave should be obtained before or after a particular event. The proviso simply says that no appeal shall lie without the leave of this Court or the court below. This Court does not see how an appeal the leave of which has been given subsequent to the filing of the notice would not be an appeal that has lain with the leave of the Court. Although Order III, rule 3(2) of the Supreme Court of Appeal Rules and the proviso thereto suggest that leave should be obtained first and the notice of appeal should be filed later or the application for leave filed first and the notice of appeal should be filed before the application is heard, this Court does not see why there should be any difference between a notice of appeal filed before filing the application for leave to appeal and the notice of appeal filed after filing the application for leave but before the hearing of the application. In both cases, the leave will not have been given. In this Court's view what seems to be a crucial element is the grant of leave to appeal and if so granted, it validates or ratifies the prior filing of the notice of appeal. It renders the pending appeal one that lies with the leave of the Court.

As this Court understands it, this Court can entertain an application for and grant leave to appeal after the appeal in this Court has been entered even if before filing the notice of appeal there was no pending application for leave to appeal. The Court is of the view that the phrase "*prior to the hearing of the application for leave to appeal*" in the proviso to sub rule (2) of Order III, rule 3 of

the Supreme Court of Appeal Rules covers all situations where the notice of appeal is filed before the leave is granted including filing the notice of appeal before the application for leave itself is filed.

The remaining question is whether, as provided in Order III, rule 19 of the Supreme Court of Appeal Rules, once the appeal has been entered in this Court and this Court has become seized of the whole proceedings between the parties the court below can still entertain an application for and grant leave to appeal. It is the view of this Court that since the limitation on the power of the court below to grant leave to appeal is imposed by subsidiary legislation (Order III, rule 19) and not by the Act itself, the same is subject to the provisions of Order V, rule 1 of the Supreme Court of Appeal Rules. The said Order V, rule 1 of the Supreme Court of Appeal Rules has similar import as Order 2 of the CPR which provides as follows:

"Effect of non–compliance

1. Failure to comply with these Rules or a direction of the Court is an irregularity.

2. Notwithstanding rule 1, **an irregularity in a proceeding, or a document, or a step taken, or order made in a proceeding, shall not render a proceeding, document, step taken or order a nullity**.

3. Where there has been a failure to comply with these Rules or a direction of the Court, the Court may–

(a) set aside all or part of the proceeding;

(b) set aside a step taken in the proceeding;

(c) declare a document or a step taken to be ineffectual;

(d) **declare a document or a step taken to be effectual**;

(e) make an order as to costs; or

(f) make any order that the Court may deem fit.

4. An application for an order under rule 2 shall–

(a) be made within a reasonable time and before the Party making the application takes a fresh step in the proceeding after becoming aware of the irregularity; and

(b) set out details of the failure to comply with these Rules or a direction of the Court."

Commenting on a similar provision under the Rules of the Supreme Court, 1965, the learned authors of Volume 1 of the Supreme Court Practice, 1999 edition had this to say at paragraph 2/1/3:

> **"The authorities, taken as a whole, show that Order 2, rule 1 [of the RSC, 1965] should be applied liberally in order to do, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules or procedure."**

That non-compliance with the requirements of the rules of procedure does not render the proceeding, document or step taken a nullity is an approach that is near universal. In ***Motloung and Another v The Sheriff, Pretoria East and Others*** [2], Gorven AJA, writing the judgment of the Supreme Court of Appeal of South Africa (in a case concerning the non-signing of a summons by the court registrar, although the same was issued by him) and with whom all the other four members of the panel concurred, had this to say which is instructive:

> "[1] The crisp issue in this appeal is whether a summons which has not been signed by the registrar of the court is a nullity or a defective pleading which is condonable under Uniform Rule 27(3). There are conflicting decisions of two divisions of the High Court on the issue. In *Noord-Kaap Lewendehawe Koöp Beperk v Lombaard*,[3] Erasmus J held that such a summons is a nullity and not susceptible of condonation. In *Chasen v Ritter*,[4] Burger AJ held that the absence of the signature of a registrar could be condoned…..
>
> [10] The starting point is the wording of a provision. The relevant parts of rule 17 provide:

[2] [2020] ZASCA 25; 2020 (5) SA 123 (SCA) (26 March 2020) http://www.saflii.org/za/cases/ZASCA/2020/25.html accessed 15 February 2022

[3] *Noord-Kaap Lewendehawe Koöp Beperk v Lombaard* 1988 (4) SA 810 (NC).

[4] *Chasen v Ritter* 1992 (4) SA 323 (SE) 325-327; [1992] 4 All SA 137 (SE).

'(1) Every person making a claim against any other person may, through the office of the registrar, sue out a summons or a combined summons addressed to the sheriff directing him to inform the defendant *inter alia* that, if he disputes the claim, and wishes to defend he shall —

5 . . . .

(3) *(a)* Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's physical address, within 15 kilometres of the office of the registrar, the attorney's postal address and, where available, the attorney's facsimile address and electronic mail address.. . .

10 *(c)* After paragraph *(a)* or *(b)* has been complied with, the summons shall be signed and issued by the registrar and made returnable by the Sheriff to the court through the registrar.'

What, then, of the language used in rule 17(3)*(c)*?

[11] The rule says that the 'summons *shall* be signed and issued by the registrar'. **The word 'shall' does not necessarily denote a peremptory provision**. In *Sutter v* 15 *Scheepers*,[5] Wessels JA suggested how to arrive at the 'real intention' of such a provision. His approach was helpfully summarised, in *Pio v Franklin NO*, as follows:[6]

'(1) The word "shall" when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.

(2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather 20 than a directory mandate.

(3) **If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory**.

(4) If when we consider the scope and objects of a provision, we find that its terms would, 25 if strictly carried out, lead to injustice and even fraud, **and if there is no explicit statement**

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[5] *Sutter v Scheepers* 1932 AD 165 at 173 – 174.
[6] *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) at 451.

that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(5) The history of the legislation also will afford a clue in some cases.'

In the present matter, the provision is couched in positive terms. Its breach carries no sanction at all, let alone one of nullity. Applied to the present matter, these guidelines favour an interpretation that the provision is directory only. However, the first principle requires consideration of 'other circumstances which negative this construction.'

[12] One such circumstance is the dictum of Rumpff JA in *Republikeinse Publikasies* concerning a summons which is not issued.[7] Another is provided in the matter of *Jongilanga*. There the address of the respondent's attorneys given in the summons was more than eight kilometres from the office of the registrar. Rule 17(3)*(a)* uses similar terms to those of rule 17(3)*(c)*, providing:

'Every summons *shall* be signed by the attorney acting for the plaintiff and *shall* bear an attorney's physical address, within 8 kilometres of the office of the registrar'.

Eloff AJA distinguished the breach in *Jongilanga* from that referred to by Rumpff JA, explaining:

'It stands to reason that when the basic component of an action, viz the issue of a summons by a Registrar, is absent, the Court will not condone the omission.'[8]

He held that the requirement to provide an address no further than eight kilometres from the office of the registrar did not stand on the same footing as the requirement that a summons be issued. The latter was, as he put it, 'the basic component of an action' while the former was not. Eloff AJA held that although 'the Rule is couched in peremptory terms, the Court has a discretion to condone a breach of its requirements'. This court has thus held that the use of 'shall' in rule 17(3)*(a)* makes the provision peremptory. I see no reason why

[7] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk1*[972] (1) SA 773 (A) 25.pdf (saflii.org) accesed 15 February 2022
[8] *Jongilanga* at 123G-I.

that word should be construed differently in a different sub-paragraph of rule 17(3). In my view, therefore, the provision for signature is peremptory....

[23] Reverting to the present matter, it has been seen that an unissued summons is a nullity. Given that this is the immediate context for the provision for signature, it is necessary to determine whether any distinction is to be drawn between the result of a failure to sign and that of a failure to issue. **Eloff AJA distinguished the situation in *Jongilanga* from the failure to issue a summons on the basis that the issuing of a summons was 'the basic component of an action'**. The failure to issue was seen as an example of the breach of a peremptory provision which leads to nullity. Can it be said that the signing of a summons is 'the basic component of an action'?

[24] In the first place, *Jongilanga* says **issuing a summons is '*the* basic component' rather than '*a* basic component'. If this is so, no other component is basic**. Why might this word have been chosen? The issue of a summons has been held to initiate an action.[9] Once it has been issued, litigation has been commenced. An action has come into existence in which a claim is made against named defendants. Once service has been effected, they are called on to defend on pain of judgment. The underlying rationale for this is that the registrar has processed the summons. It can be traced in the court records as having been initiated and has been authorised by the registrar to be sent out. After service, failure to defend may result in a judgment being entered against them, followed by a writ for execution. All of these documents will bear the allocated case number. The authorised court official has placed their imprimatur on the summons. This is probably why *Jongilanga* describes it as '*the* basic component of an action' and why Rumpff JA said that, if not issued, a summons is a nullity.

[25] **The failure to sign stands on an entirely different footing. No external consequences arise if a summons is issued but not signed. An action has been initiated. If no summons has been issued, litigation has not been initiated. No action has come into existence against the named defendants**. They may be supine in the face of such a document without consequence. Once the summons has been served, the cited defendants

[9] *Marine & Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D.

ignore it at their peril. Failure to sign does not change the status of an issued summons. Unlike the failure to issue, it cannot be said to be 'the basic component of an action'. It is much the same as any other peremptory provision of rule 17(3). I do not see how the present breach differs from the failure to comply with either of the provisions of rule 17(3)*(a)*.

[26] **As part of the interpretive exercise, the 'apparent purpose to which it is directed' must be considered and a 'purposive approach' adopted. What, then, might be the purpose of the requirement of signature? It seems to raise the issue of whether it is the registrar, rather than someone else, who has issued the summons. This is, of course, a factual enquiry which can be established in due course during the litigation. If the person who issued was not the registrar and not authorised, it can be set aside as a nullity. But if it was issued and not signed, that does not, in my view, lead to the same result**. Of course, in the present matter, the registrar's stamp, bearing his name, was affixed to the summons. The identity of the person who issued the summons was thus clear. It can scarcely be imagined that the registrar would allow anyone else to use his personalised stamp. There was no submission from the respondent that this might have been the case. In any event, once more, that is a factual enquiry to be undertaken and reverts to the question of whether the summons was in fact issued. I can discern no purpose in nullifying such a summons.

[27] This approach is buttressed by the principle, articulated almost a century ago, that:

'**The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice**.'[10]

In his judgment, sometime after the dictum under discussion, Rumpff JA cited the above authority and went on to say:

'**[I]t is desirable to repeat what is of general application, namely, that the Court does not exist for the Rules but the Rules for the Court'**.

[10] *Ncoweni v Bezuidenhout* 1927 CPD 130 at 130.

And, in ***Trans-African Insurance Co Ltd v Maluleka***,[11] Schreiner JA, in upholding the dismissal of an application to cancel an admittedly defective summons said:

'**But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits**.'[12]

[28] All of these dicta emerged from general principles of our common law applied prior to the coming into effect of the Constitution.[13] But it accords with the principles of the Constitution and thus complies with the approach to interpretation referred to in *Cool Ideas*. **It supports the constitutional right to have disputes adjudicated in a fair public hearing.[14] Overly technical approaches to hinder the courts deciding of genuine disputes between parties are to be strongly discouraged**. The need for condonation to show good cause allows for a consideration of prejudice. If courts are to err at all they should do so in finding that irregularities are susceptible of condonation rather than being necessarily visited with nullity.

[29] In my view, the present matter clearly falls within the ambit of a peremptory requirement whose breach can be condoned under rule 27(3). Despite not complying with a peremptory provision of rule 17(3)*(c)*, it is not visited with nullity. It can be condoned. The court of first instance was thus wrong to treat a failure to sign on the same basis as a failure to issue. This also means that the conclusion arrived at in *Lombaard* is incorrect and that in *Chasen* correct. Accordingly, in my respectful view, the court of first instance ought to have dismissed the special plea."

Further, in ***Marbell and Another v Marbell***[15] the Supreme Court of Ghana had this to say which this Court found illuminating:

"The general position of the law however is that non-compliance with the rules of court would not render proceedings void unless the non-compliance amounts to a breach of the

[11] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A).
[12] Ibid. 278F-H.
[13] Constitution of the Republic of South Africa, 1996.
[14] Section 34 of the Republic of South Africa Constitution.
[15] [2020] GHASC 54

rules of natural justice, a breach of the Constitution or of a statute other than the rules of court; or that the breach goes to the jurisdiction of the court. The question is whether the non-compliance in question affects the jurisdiction of the trial court therefore renders the writ and the subsequent proceedings void.

Order 81 of The High Court (Civil Procedure) Rules 2004, C. I. 47 generally provides that non-compliance with the procedural rules would not render proceedings void. The said order reads:

"Non-compliance with Rules not to render proceedings void

1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it." (Emphasis supplied)

Sight must not be lost of the fact that the word **'not'** in the phrase "the failure shall not be treated as" underlined above distorts the meaning of order 81. In the case of Republic v High Court, Accra Ex-parte Allgate Company Ltd. (Amalgamated Bank Ltd. Interested Party) [2007 -2008] SCGLR 104 this court pointed out that the word 'not' is an error in drafting or a typographical mistake in the said phrase. Until the appropriate amendment is made to correct the error, it is important to omit the word 'not' in reading the phrase to avoid the distortion.

Commentary by **Halsbury's Laws of England (Fourth Edition) Vol 37 (Practice and Procedure)** at paragraph 36 has a comment on the effect of Order 2 of the Supreme Court Rules of Practice in England. The wording of Order 81 of C. I. 47 is exactly the same as the wording of Order 2 of the English Supreme Court Rules of Practice. For a better understanding of the effect of order 81 of C. I. 47, I would quote the said commentary from Halsbury's Laws of England.

"Effect of non-compliance with rules. This is one of the most beneficent rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity. Under the former rule, which it replaced, a distinction was drawn between a non-compliance which rendered the proceedings a nullity, in which case the court had no discretion and no jurisdiction to do otherwise than set the proceedings aside, and a non-compliance which merely rendered the proceedings irregular in which case the court had a discretion to amend the defective proceedings as it thought fit. The modern rule has done away with this old distinction, and every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify as long as it can do so without injustice.

It should, however, be emphasized that this rule applies only to non-compliance with the requirements of the Rules of the Supreme Court, so that non-compliance with requirements prescribed by statute or other authority may still render the proceedings in which they occur a nullity."

Since the promulgation of C. I 47 this court has followed the trend as stated in this commentary. Thus Professor Date Baah JSC speaking for the court in the case of **Republic v High Court, Accra; Ex-parte Allgate Co Ltd. [2007-2008] SCGLR 1041** said,

"where there had been non-compliance with any of the rules contained in the High Court (Civil Procedure) Rules, 2004 (C. I. 47), such non-compliance is to be regarded as an irregularity that does not result in nullity, unless the non-compliance is also a breach of the Constitution or of a statute other than the rules of court or the rules of natural justice or otherwise goes to the jurisdiction."

In the case of **Boakye v Tutuyehene [2007-2008] 2 SCGLR 970** This court held that by the plain meaning of Order **81 "perhaps apart from lack of jurisdiction in its true and strict sense, any other wrong step taken in any legal suit should not have the effect of nullifying the judgment or the proceedings".**

The above exposition of the law is correct. This Court adopts the principles set out in the dictum above as its own. This Court finds and concludes that, as Order V of the Supreme Court of Appeal Rules shows, non-compliance with any requirement of the Rules was not intended to have the effect of rendering the step taken a nullity. As we understand it, Order V of the Supreme Court of Appeal Rules, was intended to give this Court power to waive the irregularity. As pointed earlier, this Court would not have the power to waive the non-compliance with the need to obtain leave from this Court after the entry of the appeal if that requirement emanated from the provisions of the Supreme Court of Appeal Act itself or other statute. There is a huge difference between failing to obtain leave to appeal and obtaining it in the "wrong" Court. The requirement that there be leave to appeal (either from the court below or from this Court) in the instances set our under the second proviso to section 21 of the Supreme Court of Appeal Act is a requirement of the Act itself and this Court has no power to waive the peremptory requirement. In those instances, there must be leave or there will be no competent appeal. In that case, non-compliance, that is, failure to obtain leave may render the appeal a nullity. On that basis, this Court is in total agreement with all the decisions of this Court in which it has dismissed appeals for failure to obtain the leave of either the court below or of this Court. The ***Malawi Revenue Authority v Laura Kandulu***[16] is one such case. On the other hand, the requirement that once the appeal has been entered, from that time onwards, all interlocutory applications in the appeal be made to this Court, is a requirement of the rules of court and, therefore, subject to the provisions of Order V of the Supreme Court of Appeal Rules. It is for this reason that this Court finds and concludes that, although Order III, rule 19 of the of the Supreme Court of Appeal Rules requires that any application in the appeal from the time the appeal is entered to the time it is disposed of be made to this Court, non-compliance with that requirement by the Appellant in applying for and obtaining the leave to appeal from the court below when the appeal herein had already been entered and this Court was already seized with the appeal, did not render the step taken or the leave obtained a nullity. This Court can waive the irregularity as provided for under Order V of the Supreme Court of Appeal Rules.

In concluding thus, the Court is alive to the fact that it was easy to seize this opportunity and argue that, based on Order III, rule 19 of the Supreme Court of Appeal Rules, the court below lacked jurisdiction when it granted the stay and to argue that there was no competent leave to appeal and

[16] MSCA Civil Appeal No. 51 of 2016 (unreported)

to urge this Court to dismiss the appeal. However, as seen above the law would not support that position as this Court has jurisdiction to entertain the application for leave and grant leave to appeal after the appeal has been entered. Respecting the court below, Order III, rule 19 of the Supreme Court of Appeal Rules places a limitation on the power of the court below to entertain applications for and grant of leave to appeal. The restriction should be observed in the majority of cases but from time to time there will be infractions of this requirement like any other requirements under the Supreme Court of Appeal Rules. In this matter, it is this Court's understanding of the law that the Appellant's non-compliance with Order III, rule 19 of the Supreme Court of Appeal Rules is a mere irregularity and it is curable by the Court as it does not go to the root of the appellant's appeal.

Parties are bound by their pleadings

The Court will now turn to the substantial issues raised by grounds of appeal (a), (b) and (c)). These are whether or not the award that the judge made in the court below was that of special damages; and whether or the same ought to have been pleaded by the Respondent in their pleadings. As this Court understands the law, pleadings ought to contain the claim of the claimant and the claim cannot be made out by the claimant in a sworn statement. This is the because the same will be considered as evidence and not a claim[17].

The action by the Respondent was commenced by Originating Summons dated 14 December, 2016. Thus, the position at law is the court can only decide cases as pleaded by parties. In the instant case the court below could only determine the issues raised by the Originating Summons. The case of ***Attorney General v The Honourable Chakufwa Chihana*** [18] is instructive in this regard. This Court observed thus in respect of the Originating Summons filed by the respondent in the court below:

> "We would wish to agree with the learned Solicitor-General that according to the ordinary meaning of the word pension it is not correct to say that pension is earned during the period of service. Our view is that pension is paid upon retirement and obviously at the end of agreed period of service. It is paid in recognition of past service.

[17] *Tambula v David Whitehead and Sons (Mal) Ltd* [1991] 14 MLR 478 (HC) ; see also O.28 r 1A, RSC [1999].
[18] [2002- 2003] MLR

The learned Solicitor-General cited the case of Nseula v Attorney General and another MSCA Civil Appeal no. 32 of 1997 in which Banda CJ said at 6:

> In our judicial system it is the parties themselves who set out issues for determination by the court through their pleadings both of them must strictly adhere to the pleadings. In the present case although the judge stated that he had invited Counsel to address him on the effect of the provision of section 88(3) of the Constitution the matter was not raised on the pleadings by either party. In our view it was perfectly open to him to express his opinion by way of obiter, on what he felt was the effect of the provision of section 88(3) of the Constitution. It was therefore, wrong for the Judge to decide on a matter which had not been raised by the parties on their pleadings and he should not have made it the definitive of his decision.
>
> In the light of the observation made in the Nseula case we would agree with the Solicitor-General that the learned Judge was wrong when he made a declaration which went beyond the terms of the declarations sought by the respondent. The learned Judge ended his judgment by declaring that the respondent is entitled to gratuity, pension and other benefits. The learned Solicitor-General complains that the learned Judged did not even invite Counsel to address him on the question of the respondent eligibility to receive gratuity and other benefits in view of the fact that, according to his own pleadings contained in the originating summons, the respondent sought only pension."[19] (Emphasis supplied).

It is the understanding of this Court that in actions commenced by Originating Summons the reliefs are pleaded in the Originating Summons. Actually, this position was confirmed by this Court in the case of ***Malawi Communications Regulatory Authority v Joy Radio Ltd*** [20] at p. 273 when it put the law thus:

> "The Originating Summons was made under Order 28 of the Rules of the Supreme Court. We read the scope of this order with Order 7 rule 3 which provides that every originating summons must include a statement of the questions on which the plaintiff seeks determination or direction of the court or, as the case may be, a concise statement of the reliefs or remedy claimed in the proceedings with sufficient particulars to identify the cause

[19] Ibid. 302
[20] [2012] MLR 256

or causes of action in respect of which the plaintiff claims that relief or remedy."[21] (Emphasis supplied).

It is on record that, in the Originating Summons filed in this matter, the Respondent pleaded remedies that are in the Originating Summons itself. The Respondent did not plead payment of the sum of K24,500,000 that the court below awarded him. This Court finds that the Judge erred in law and the award should accordingly be set aside[22] as the Originating Summons did not refer to the sum of K24,500,000 .

It is an established principle of law that special damages must be specially pleaded and specially proven. Put in another way, the position at law is that damages sought must be pleaded and proven. Thus, in ***Malawi National Examination Board v Universal Web*** [23] this Court laid down the law as follows:

> "It is generally agreed in our practice that the distinction between general damages and special damages, must be made. This is a practice we have followed and protected and our rules of procedure are particular about pleading in that regard. Pleadings are not just a summary of the matter before court, but also serve as a curb on issues for determination between the parties. A basic distinction between general damages and special damages must be made in dealing with damages in a particular case.
>
> General damages consist in all items of loss which the claimant is not required to specify in his pleadings in order to permit proof and recovery in respect of them at the trial. Special damages consist in all items of loss which must be specified by him before they may be proven and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence, or the specific amount of claim which he will be confronted with at the trial McGregor on Damages, Seventeen Edition Para 43-006."[24]

In the Court of Appeal in England, in ***Ratcliffe v Evans*** [25] the Court instructively put it as follows:

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[21] Ibid. 273
[22] This position in law was earlier confirmed by this court ***in Malawi Telecommunications Ltd v S.R. Nicholas Limited*** [2014] MLR 218 (SCA) at 225 to 227 paragraphs
[23] [2014] MLR 178
[24] Ibid. 195 -196
[25] [1892] 2 QB 524

"Special damage means the particular damage (beyond the general damages) which results from the particular circumstances of the case, and of the claimant's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.

If an item of damage is general for the purpose of liability because it represents a normal loss, a fortiori it will be general for the purpose of pleading in so far as its existence cannot take the defendant by surprise; only in so far as he could be surprised by the detail of its amount, when this has become crystalized and concrete since the wrong, it will become special damages.

The position is that whether the damages are general or special, such must be pleaded. It is not sufficient to plead the broad conventional allegation that by reason of the pleaded facts damage has been suffered. (See ***Lourho v Fayed (no. 5)*** [1993] 1 WLR 1489, CA.

Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so became crystalized or because it can be measured with complete accuracy, this exact loss must be pleaded as a special damage. McGregor para 43-001 (see also ***British Transport Commission v Gourley*** [1956] A.C. 156 and ***Ilkiw v Samuels*** [1963] 1 WLR 991, CA.

Looking at the statement of claim, it unclear to us which way the appellant wanted to take its case. It would either be a case in general damages or a case in special damages; that did not help matters. Surely it did not help the respondent in preparing for what to anticipate during trial. We can well understand the concerns raised by the trial Judge and the sentiments that were made that led him to determine as he did"[26] (Emphasis supplied).

The above position of the law as captured in the dictum above also obtains in the decision of this Court in ***Manica (Malawi) Ltd v Mrs. D. Mbendera t/a P.G. Stationery*** [27]. It is well to observe that that in this case respondent pleaded general damages. This pleading was never withdrawn nor was there any amendment. This Court held in ***National Bank of Malawi v Right Price Wholesalers Ltd*** [28] that each party is bound by its pleadings. Therefore, the Respondent was bound

[26] Ibid. 528
[27] [2005] MLR 225
[28] [2013] MLR 296 at p. 282

to claim for general damages as put in the Originating Summons. This Court finds and concludes that the court below court erred in proceeding to award special damages in the sum of K24,500,000 as this was never pleaded.

Respondent unjustly overcompensated

We shall now deal with issues raised by grounds of appeal (d), (e), (f), (g), (h),(i). This Court earlier observed that the Respondent sought in the Originating Summons that he be awarded general damages. Further, in the supplementary affidavit in support he prayed that he be awarded the sum of US$60,000 being price for a brand new Nissan UD95.

It seems that in awarding the sum of K24,000,000 the Judge adopted the Respondent's skeletal arguments in which he argued that he be paid the difference between the market price and the contract price of the vehicle. However, it is well to note that a skeletal argument it is neither a pleading nor a substitute for a pleading. Courts only decide cases on pleadings presented by parties. Further, it is noted that in adopting the Respondent's skeletal arguments the Judge proceeded to use a price of brand new vehicle as basis for measuring damages in this matter. This Court finds and concludes that the approach adopted by the court below was unjust. We so find and conclude for the following reasons:

First, the vehicle that was being sold by the Appellant was a second hand vehicle and not a brand new vehicle. Thus, the substitute motor vehicle would only be another second hand vehicle and not a brand new vehicle. The price he paid was for purchase of a second hand truck and not a brand new one. Secondly, in awarding the Respondent damages that would enable him add the award to the purchase price of K20,500,000 that he paid, which monies was refunded, the court below over compensated the Respondent. Thus, the award is unjust and must be set aside.

Further, this Court has noted that the formula that the Judge employed applies where there is an action against the seller for damages for non-delivery under section 51(1) of the Sale of Goods Act. There was no action for damages for non-delivery in this matter. The action in this matter is for breach of contract and The Respondent pleaded relief of general damages for breach of contract. In an action for damages for non-delivery one would be seeking special damages which would (if sought) have to be specifically pleaded and specially proven. Turning to the instant case,

this Court notes that the sum of K24,500,000 awarded to the Respondent was not only not pleaded. It is not there even in the evidence in support of the Originating Summons. This begs the question, where did the Judge get this figure?

It is therefore the finding of this Court that that although it is accepted that there was breach of contract in this matter there was no proof of damage beyond a refund of the purchase ofK20,500,000 that had been paid by the Respondent. This would be a proper case where nominal damages should have been ordered by the Judge.

DETERMINATION

ORDER

Appeal is partially allowed with each party to bear own costs for the proceedings in this Court. However, the costs in the Court below are for the Respondent. Damages are reduced from K 24,500, 000 to K 6,500,000. Judgment of the court below will accordingly change.

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HONOURABLE JUSTICE F.E. KAPANDA SC, JA

Judgment delivered by Justice H. S.B. Potani JA:

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also allow the appeal. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

.....

HONOURABLE JUSTICE H.S.B POTANI JA

Judgment delivered by Justice J. N Katsala JA:

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also partially allow the appeal. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

.....

HONOURABLE JUSTICE J. N KATSALA JA

Judgment delivered by Justice I.C. Kamanga JA;

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also partially allow the appeal. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

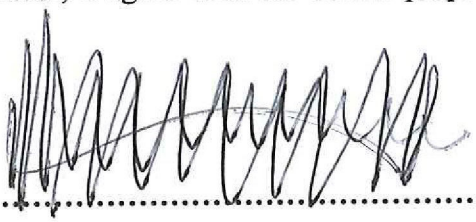
.....

HONOURABLE JUSTICE I. C. KAMANGA JA

<u>Judgment delivered by Justice M.C.C. Mkandawire JA:</u>

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also partially allow the appeal. I abide by the order for costs contained in

the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.



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HONOURABLE JUSTICE M.C.C. MKANDAWIRE JA

Pronounced in Open Court on the 28th day of October 2021 at Blantyre, in the Republic of Malawi.