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JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1752 OF 2016

BETWEEN:

SOUTHERN BOTTLERS LIMITED .....**PLAINTIFF**

- VS-

LIVINGSTONE WALITA .....**DEFENDANT**

CORAM: THE HONOURABLE MR JUSTICE CHIRWA

Mr Kamkwasi, of the Counsel for the Plaintiff

Messrs Nyirenda/ Chibwe, of Counsel, for the Defendant

Mr Amos, Official Court Interpreter

JUDGEMENT

By a Specially Endorsed Writ of Summons (as amended) , issued on the 5th of October, 2009, the Plaintiff claims against the Defendant damages for trespass to motor vehicle registration number MZ 4626 and a laptop computer. The Plaintiff also prays for a mandatory injunction for an order that the Defendant do hand over to the Plaintiff the said properties. Finally, the Plaintiff claims costs of this action.

It is the Plaintiff ' s case as per his Statement of Claim, that it requested the Defendant, who had at all material times been its employee until September 30th, 2009 when his fixed term contract expired, to surrender all company properties in his possession at the expiry of his contract. It is the Plaintiff's case further that the Defendant refused to

surrender the Plaintiff's said properties and tried to force it to sell the same to him. It is still further the Plaintiff's case that it mitigated the damage caused to it by the Defendant's wrongful detention and use of its said properties by exercising its common law right to enforce possession.

The Defendant on the other hand, by his Defence and Counterclaim dated the 20th day of October, 2009 denies having ever trespassed on the Plaintiff's said properties as alleged. It is his contention that he is entitled to the ownership and possession of the said motor vehicle by virtue of a car ownership scheme with the Plaintiff under which he was entitled to ownership of the car after using it for 5 years and that having used the said motor vehicle from 2003 he thus automatically became entitled to the ownership of the same at the date of his Defence, aforesaid.

It is the Defendant's further contention that the Plaintiff having forcibly, wrongfully and unlawfully confiscated the said motor vehicle from him on the 6th of October, 2009, the Plaintiff, in the premises, has no cause of action against him. The Defendant has contended, in the alternative, that he was at all material times entitled to possession of the said motor vehicle by way of lien for unpaid terminal benefits.

In conclusion, the Defendant has counter-claimed against the Plaintiff for the following: ·

(a) A declaration that he is entitled to ownership and possession of the said motor vehicle;
(b) An order that the said motor vehicle be returned to him or in the alternative, that the Plaintiff pays him the market value thereof;
(c) Damages for loss of use of the said motor vehicle;
(d) An order that the Plaintiff returns to him the following items:
    i. Rosary,

ii. Fire extinguisher,
iii. Tow rope,
iv. Club,

(e) Alternatively, that monetary compensation be paid for the items;
(f) Special damages as pleaded in the Defence and Counter- claim;
(g) The total sum of MK4,097,845.55
(h) Interest thereon at the commercial bank lending rate plus 33, from the date of writ and further interest thereon to the date of payment.
(i) Damages for inconvenience and distress suffered;
(j) Damages for assault and battery on the aggravated footing,
(k) Damages for detention.

The Plaintiff's Defence to the Defendant ' s counterclaim is that after the Defendant's contract of employment with it had expired it humbly asked the Defendant to return to it the said motor vehicle and the laptop computer and that it only invoked its common law right to possession because the Defendant refused to surrender the said properties. The Plaintiff has also denied being liable to the Defendant for any of the sums of money claimed in the counter claim, the claim for general damages etc.

Issue for Determination-

The main issue for determination, in this action, in this Court's considered view, is: who between the Plaintiff and the Defendant was entitled to the ownership and possession of the said motor vehicle as at the time the Plaintiff repossessed the same from the Defendant, to writ, as at the 6th of October, 2009.

The Burden and Standard of Proof.

The burden of proof in a civil action is on the party who asserts the affirmative, hence the latin maxim: *'ei qui affirmat non ei qui negat incumbit probatio*', per **Lord Maugham** in the case of **Constantine Steam Shipline v Imperial Smelting Corporation Limited** [1942] A.C. 154 at p.174, cited with approval by **Unyolo J.A** (as he then was) in the case of **Limbe Leaf Tobacco v Chikwawa & Others** [1966] M.L.R 480 at p.484. See also the case of 1 **Chinyama v Land Train Haulage** [1999] MLR 99 at p 102 where **Ndovi J** said:

> *"The burden of proof in* a *civil* case *lies on the Plaintiff. He who alleges or asserts* a *fact must prove* and *must* do so *on* a *balance of probabilities."*

And as regards the standard of proof in civil cases,-the same is on·a preponderance of probabilities - See: **Denning J** (as he then was) in the case of **Miller v Minister of Pensions** [1947] All E.R. 372 at p. 374. And also the case of **Chinyama v LandTrain Haulag** (supra)

The Evidence-

To prove its case, the Plaintiff called 2 witnesses, namely, **Innocent Chidzulo** (PW1) and **Tsoka Daniel** (PW2). The Defendant on his part had only one witness, namely, **Lingston Walita** (DW1), the Defendant himself.

PW1 adopted his written statement as his evidence-in-chief in this action. He was cross-examined and re-examined. And PW2, who happens to have been the main witness for the Plaintiff's case, adopted his two written statements, the original one and the supplementary one and also produced is Exhibits, i.e. Exhibits "P1" to "P14" as his evidence-in-chief. He was cross-examined and re- examined.

DW1, on his part, also adopted his written statement and produced 16 Exhibits, i.e. Exhibits "D1" to "D16", as his evidence-in-chief. He was cross-examined and re-examined.

The evidence of PW2 is that the Defendant was employed by the plaintiff on a renewable contract basis as per copy of the contract produced in this action and marked as Exhibit P1. It is PW2's evidence further that on or about the 29th of June, 2009 the Defendant was suspended pending a disciplinary hearing in respect of allegations made against him. There is produced in evidence Exhibit P2, a letter dated the 29th of June, 2009. It is further the evidence of PW2 that on or about the 7th of July, 2009, the Defendant appeared before a disciplinary hearing in respect of the allegations made against him and that the results of the said disciplinary hearing were duly communicated to the Defendant. There is produced in this action by the witness Exhibit "P4", a letter dated the 10th of July, 2009. By the said Exhibit the Plaintiff is terminating the Defendant ' s services with the Plaintiff by, inter alia, making a payment of three months to the Defendant in lieu of the notice which the Defendant was expected to serve up to the 30th of September, 2009 . It is the further evidence of PW2 that the Defendant responded to Exhibit "P4" by making several requests, including a request that he assumes ownership of the said motor vehicle as per previous car scheme arrangement which he was on at the beginning of employment with the Plaintiff. There is produced in this action on behalf of the Plaintiff Exhibit P5, a Memorandum dated the 27th of July, 2009 from the Defendant to the Plaintiff. It is further the evidence of PW2 that despite a request from the Plaintiff that the Defendant should surrender the said motor vehicle the Defendant continued to use the same despite the fact that the said motor vehicle had always belonged to it. There is produced on behalf of the Plaintiff Exhibit "P7", a copy of the registration certificate for the said motor vehicle.

On the other hand, the evidence of the DW 1 is as follows: that he was employed by the Plaintiff as an Engineer in January 1996 as per Exhibit “D1", a letter of appointment dated December the 18th 1995. It is DW1's evidence further that in October, 2000 he was employed by the Plaintiff as the Operations Manager for the Central and Northern Regions on a three year fixed term contract up to 30th September, 2003. There is produced in this action by DW1 Exhibit “D2", an undated contract of Employment. It is DW1's evidence further that upon expiry of his contract of employment as per Exhibit "D2" in September, 2003, the Plaintiff renewed the same for a further term of 3 years. There is also produced in this action Exhibit “D3", a copy of the Contract of Employment dated October, 2003. This Exhibit is the same as Exhibit “P1” for the Plaintiff's case. It is further the evidence of DW1 that upon the expiry of his contract as per Exhibit “D3" the Plaintiff renewed the same for a further period of 3 years. There is produced in this action Exhibit “D4", a letter dated the 19th of December, 2006 from the Plaintiff to the Defendant. It is DW1's evidence further that the contract as per Exhibit “D4" was due to expiry on the 30th of September, 2009.

It is the further evidence of DW1 that he is entitled to the ownership of the said motor vehicle because the first motor vehicle which had been bought for his use under Exhibit “D1", though registered in the name of the Plaintiff became his property after it had clocked 5 years. It is DW1 ' s further evidence that because the Plaintiff had stopped maintaining the said motor vehicle he used to maintain and service the same personally and spent about K243, 651 .41 for services with Toyota Malawi. There is produced by DW 1 Exhibits "D9" to “D11", copies of the Invoices from Toyota Malawi.

In cross-examination DW1 told this Court that he did not hold on to the said motor vehicle because it was his belief that the same belonged to him as had been suggested by Counsel for the Plaintiff. He

conceded that the said motor vehicle was in the Plaintiff's name and thus legally belonged to the Plaintiff. And when referred to Exhibit "D12", DW1 told this Court that he wanted to be treated under the old scheme which allowed employees of the Plaintiff to acquire the ownership of the vehicle after it had clocked 5 years while in the use by the employee.

Determination

This Court has carefully analysed the terms of the contract of employment under which the Defendant was serving the Plaintiff at the time of the termination of his services produced in this action by the parties as Exhibit "P1" and Exhibit "D4" and hastens to say that there is nothing thereunder giving the Defendant a right to the ownership of the said motor vehicle. The Exhibit has the following provision relating to motor vehicle:

> *"3.4* ***Lingstone Walita*** *will also be entitled to the following:-*
> *(c) A suitable company vehicle. All expenses in connection with maintenance, reasonable running costs ·and insurance of the car shall be paid by the Company. "*

It is the considered view of this Court that interpreting the above provision as giving title to any vehicle bought by the Plaintiff for the use by the Defendant in the discharge of his duties to the Defendant would be erroneous and an attempt to re-write the contract for the parties hereto which cannot be the business of this Court or any other court of law. Indeed, if there had earlier on been a car ownership policy or scheme at the Plaintiff's work place whereby an employee of the Plaintiff was entitled to purchase a motor vehicle allocated to him for use after he had used the same for a period of not less than 5 years as the Defendant wanted this Court to believe, then it is apparent from the evidence before this Court that such a policy or scheme was no longer in existence in 2009.

Exhibit "D12" or Exhibit "P5" which is the Defendant's own memorandum dated 27th of July, 2009 bears this fact out. In point 5 of the second paragraph of the said memorandum this is what the Defendant says:

> "5. *The lack of* a *coherent car ownership scheme within the company has negatively affected me to such an extent that six years on I* am *driving the same vehicle that should have been replaced ages* ago. *I ask that I assume total ownership for it as per previous car scheme arrangement* that I was on at beginning of employment with SOBO."

Further, the Defendant also conceded in his cross-examination that since, the said motor vehicle was in the Plaintiff's name it thus legally belonged to the Plaintiff.

Suffice, to say, that since both the title holder and owner of the said motor vehicle as per Exhibit "P7", the Motor Vehicle Registration Certificate for the said motor vehicle, is the Plaintiff and not the Defendant, this Court would have no problems in finding as a fact that the Plaintiff is thus the person entitled to the ownership and possession of the same.

It is trite law that " proof of ownership is prima facie proof of possession, unless there is evidence that another person is in occupation, but' if there is a dispute as to which of the two persons is in possession, the presumption is that a person having a title to the land is in possession" - See **Clerk & Lindsell on Torts,** 15th Edition, paragraph 22 - 08.

But what then was the position of the Defendant in this action? One may ask. It is the considered view of this Court that the Defendant was a mere licensee. And for him the law is also clear that "a licensee whose licence has been withdrawn has no right to re-enter on the land. - See **Thomas V Park** [1944] 1 K.B. 408 at p. 410 as per **Goddard L.J.**

In the present action it can be safely stated that the Defendant whose licence had been withdrawn by the Plaintiff as per Exhibit "P4," a Memorandum dated the 10th of July, 2009 from the Plaintiff to the Defendant, thus had no right to retain the custody or possession of the said motor vehicle after the 17th of July, 2009. The Defendant would have been obligated to surrender the said motor vehicle, immediately his licence had been revoked.

In this case however, the positive seems to be different. This is so because the Defendant was entitled to the continued use of the said motor vehicle during the 3 months' period of his notice unless the Plaintiff had opted to pay money to the Defendant in lieu of his right to the use of the same, under the contract (Exhibit P1 or Exhibit "D3" as read with Exhibit "D4") for the said period. There is however, no evidence before this Court to show that the Plaintiff had tendered any money to the Defendant in this regard.

Now, in so far as the Plaintiff's claim for damages for trespass in relation to the said motor vehicle is concerned, it is the finding of this Court that the Plaintiff is entitled to the same only for the period after the 30th of September, 2009 to the 6th of October, 2009, that is to say, for a period of 6 days only.

The position is however, different in relation to the Plaintiff's claim for damages for trespass to the laptop computer. It is the considered

view of this Court that since the computer must have been given to the Defendant specific ally for use in the discharge of his duties with the Plaintiff as its employee as opposed to the use of the same generally, the Defendant's right to possession of the same ceased on Friday the 17th of July, 2009 (See Exhibit "P4") . In the premises, the Plaintiff would be entitled to claim damages for trespass to the said laptop computer from the 18th of July, 2009 to the 6th of October, 2009.

The Plaintiff having already recovered its said properties, through PW1, this Court thus finds it unnecessary to grant the order for a mandatory injunction prayed for by it.

Turning to the Defendant's counter - claim, this Court having already found that the Defendant was not entitled to the ownership and possession of the said motor vehicle, the Defendant's claim for a declaration that he is entitled to the ownership and possession of the same is thus without merit. This Court declines to grant the same. It is thus dismissed. Equally, this Court would not be inclined to grant the Defendant's prayer for (a) an order that the said motor vehicle be returned to him or in the alternative that the Plaintiff pays the Defendant the market value of the said vehicle and (b) damages for loss of use of the said motor vehicle. This Court finds no merit in these prayers. They are also consequently dismissed.

And as regards the Defendant's prayers for the return of his following items, to wit, (a) Rosary, (b) Fire Extinguisher, (c) Tow Rope and (d) Club or alternatively, that monetary compensation be paid for the said items it is the considered view of this Court that as a trespasser of the said motor vehicle at the time of its repossession by the Plaintiff through PW1 the Defendant has himself to blame for the alleged loss of his said items, if indeed the same were lost at that time. Put differently, the Defendant as a trespasser at the material time has, no

cause of action at law against the Plaintiff . It is trite that one of the remedies which a legal owner of the property has is at once to turn a trespasser out of the same and re-instated himself, even if the same be by force. See **Clerk and Lindsell on Torts** paragraph 22-12. It was thus not even necessary for the Plaintiff to attempt to dispute the allegation that the Defendant had any such items in the said motor vehicle at the time it was repossessed from him.

And turning to the Defendant's claim for the sum of MK4, 097,845.55 which is made up of the following:

(a) Notice pay (3months)……MK1,307,250.00
(b) Severance allowance under paid……MK2,490,595.55
(c) Money spent on maintenance
*Of the said motor vehicle……..MK*300,000.00
Total= K4,097,845.55,

This being a claim for special damages the authorities are abound that the same ought to be specifically pleaded and strictly proved - See: **Milanzi v Attorney General** [1992] 15 M.L.R 262 at p270 (per Mtegha J (as He then was) and **Chikaoneka t/a Mdalitso Clothing Factory v lndefund Limited** [2002-2003] M.L.R . l0 at p. 1 6 where the Malawi Supreme Court of Appeal said:

> *"It is the clear principle of the law that special* damages, *such as loss of profits or business must be specifically pleaded and strictly prove*d *by the plaintiff during trial. (See the case of* ***General Farming Limited v Chombo*** *MSCA Civil Appeal* No. *15 of 1995 (unreported) and also the case* ***of Perestrello E. Companhia Limited v United Paid Company Limited*** *[1969] W. L.R. 570)."*

Turning first, to the claim for 3 months ' notice pay in the sum of K 1,307,250 .00. The evidence of the Defendant on this claim as per the written statement of DW1 is as follows:

> *"I have not been paid notice pay totalling MK1,917,557.56 which is* K639,*186.53* x 3 *months."*

While the evidence of the Plaintiff as per the written statement of PW2 is as follows:

> *"13. The net pay due to the Defendant in terms* of *his contract* of *employment is MK1,*093,353.37. *I attach hereto documents showing that the net pay due to the Defendant is MK1,*093,353.37 and *I mark them "SS9", "SS10*" and *" SS11* ", *respectively.*
>
> *14. We* mode a *payment into court in respect* of *this amount as evidenced by the notice* of *payment, cheque payable to the High Court* of *Malawi* and *receipt* from *the High Court* and *mark them SS12, SS13* and *SS14, respectively."*

The notice of payment into Court "SS12" which in this Court is Exhibit "P12" shows that the payment was made into Court on the 17th November, 201 0. And since the Defendant's claim for the notice pay as per his Defence and Counter-claim is dated the 20th of October, 2009, it would be the finding of this Court that the Defendant's claim for notice pay is made out. The vexing question however, is how much is the notice pay due to the Defendant? According to the Defendant, the amount is MK1,917,559.56 while according to the Plaintiff, the amount is M K1,093,206.00 (See Exhibits "P9" & "P10") .

Section 30 (2) of the Employment Act which provides for notice pay is worded as follows:

> *" (2) in lieu of providing notice of termination the employer shall pay the employee a sum equal to the remuneration that would have been received* and *confer* on *the employee all other benefits, due to the employee up to the expiration of the required period of notice. "*

It is evident in this action that in arriving at the figure of K1,093,206.00 as the notice pay due to the Defendant the Plaintiff had simply multiplied the Defendant ' s monthly salary of MK364,403.00 by 3 months which equals MK1,093,206 .00. This is, no doubt, faulty because according to S30 (2) of the Employment Act the computation of the notice pay ought to include all other benefits due to the Defendant as an employee up to the expiration of the period of the notice. This Court would, in the premises, be inclined to find that the Defendant's calculation as per his written statement is the proper computation in that the same has all the other benefits which the Defendant was entitled to as an employee of the Plaintiff. It may be worth mentioning here that this Court found PW2's disputation of some of the benefits due to the Defendant untenable. It was clear to this Court that the witness was not fully conversant with the exact benefits which were payable to the Defendant. As a matter of fact the witness even failed to explain in cross-examination why there was a difference between the sums of K1,555,933 .38 and K1,093,353.37. The witness could not also explain why "school fees", "members' hip subscription for the Board of Engineers" etc. which were benefits due to the Defendant had not been included by the Plaintiff in Exhibit "P10".

It is, in the further premises, the finding of this Court that the Defendant is entitled to the payment of the sum of MK1,917,559.56 which is

arrived at by using the multiplicand of MK63,186.52 being the total of all the benefits due to the Defendant by 3 months as the multiplier. However, the Plaintiff having made a payment of the sum of MK1,093,353.37 into Court on the 17th of October, 2010, the Plaintiff's obligation is thus to pay only the difference between the two sums, which equals MK824,206.19.

Turning to the Defendant's claim for underpaid severance pay in the sum of MK2,490,595.55. It is evident to this court that the difference between the sum of MK7,149,525,37 which the Plaintiff computed as the gross amount of severance allowance due to the Defendant as per Exhibits "P10" of "D16" and the sum of MK8,948,611.28 which the Defendant computed as the gross amount of severance allowance due to him as per his written statement (See paragraph 31) is again as a result of the difference in the multiplicands used for computing the same .

"Severance allowance" or "pay" is provided for in Section 35 (1) of the Employment Act (Cap. 55:01 of the Laws of Malawi) as follows: ,

> "On *termination of contract by mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination a* severance *allowance to be calculated in accordance with the first schedule".*

At the time of the termination of the Defendant's employment on 30th September, 2009 the First schedule is as amended by General Notice No. 24/2004 . In relation to an employee who had been in continuous employment for a period exceeding 10 years the severance allowance was 4 weeks' wages for each completed year. There are several decisions made by our Courts including the Malawi Supreme

Court of Appeal which have held that the "wages" include all the benefits which the employee was entitled to at the time of the termination of his employment. For example, the case of **Stanbic Bank Limited V Richard Mtukula,** MSCA Civil Appeal No. 34 of 2006 (unreported) where the Court, inter alia, held as follows:

> *"Clearly, the* words *wages, salary and pay are broad enough to* cover *payments such as allowances and other benefits made either in cash* or *kind".*

The Plaintiff's computation of the severance pay as per Exhibit "P10" or "D16" has only some of the benefits included and not all. PW2, as a matter of fact, conceded during cross-examination that Exhibits "P10" &"D16" do not include "school fees," "club membership subscription for Board of Engineers," etc. Thus much as PW2 wanted this Court to believe that "fuel" and "medical allowance" were not benefits but tools in use in the Defendant's work, this Court is not inclined to entertain such a notion. It is the considered view of this Court that all the benefits which the Defendant was entitled to at the time of the termination of his services with the Plaintiff should have been included in arriving at the multiplicand used for the computation of the severance allowance payable. This Court would thus be inclined to hold that the multiplicand used by the Defendant is the correct one. In the premises, the Defendant would be entitled to the difference between the sum of MK8,948,611.28, the amount found after taking into account all the benefits that the Defendant was entitled to and the sum of MK7,149,525.37 which the Plaintiff computed as the severance allowance payable to the Defendant which equals Mkl,799,085.91. If percentage of tax on the same is indeed 303 as per the Defendant's evidence. This would give the Defendant a net sum of MK1,259,360.4.

Turning to the Defendant's claim for costs for the maintenance of the said motor vehicle in the sum of MK300, 000.00. The only evidence adduced by the Defendant in support of this claim are Exhibit "D9 ","D10" and "D11", the surtax Invoices issued by Toyota Malawi Limited in the sums of MK129,137.83, MK45,350.54 and MK69,164.04, respectively. The evidence of the Plaintiff as per PW2 is that the said Exhibits were paid for by the Plaintiff. Both the parties, however, have not produced any evidence of their alleged payments before this Court. However, it being the Defendant who is claiming a re-payment of the same the burden was on him to adduce the necessary evidence to satisfy this Court that he indeed paid the same and that the Plaintiff, as the party obligated to pay the same under the contract of employment (Exhibit "03" as read with Exhibit "D4" vide clause 3.4 (c)), should re-imburse him of the said payment, hence the latin maxim *" ei qui offirmot* non *ei qui negot incumbit probotio".* The Defendant having thus f ailed to strictly prove the said claim, this Court would thus be inclined to dismiss the said claim for lack of strict proof.

In passing, this Court finds it difficult to believe that the Defendant could really have proceeded to pay for the maintenance of the said motor vehicle. The doubt comes about for the following reasons: Firstly, the said motor vehicle was at all material times the property of the Plaintiff, secondly, the same was being used by him in the discharge of his duties with the Plaintiff and thirdly, the terms of the contract as per Exhibit "D3" clearly provide that" all expenses in connection with maintenance, reasonable running costs and insurance of the car shall be paid by the Company." What then could have prompted the Plaintiff to pay the said expenses? There can be no good reason for so doing.

Lastly, turning to the Defendant's claims for damages for (a) inconvenience and distress, (b) assault and battery and (c)

defamation, it is the considered view of this Court that the Defendant has not only failed to give sufficient particulars for these claims but has also failed to adduce any evidence to support the same. This Court is thus not inclined to allow, the same. It may be worth adding that the alleged claims having been brought about as a result of the Defendant's own conduct in wrongfully retaining the Plaintiff's properties, the principle *volent* non *fit injuria* would be invoked against him.

The Interest

Regarding the claim for interest on the sums found due to the Defendant herein, this Court finds it only fair to grant the same to the Defendant as follows: (a) On the amount paid into court by the Plaintiff, the Defendant is entitled to interest on this amount only for the period 6th October, 2009 to the date of the payment of the same into court; (b) on the difference in the severance allowances, from 6th October, 2009 to the date of payment of the same.

The Defendant having not laid any basis for the claim of interest at the "Commercial Bank lending rates plus 33", this Court orders that the interest be at the ordinary simple rate.

Both the damages payable to the Plaintiff for trespass and the interest payable to the Defendant for the loss of use of his moneys shall be assessed by the Registrar of this Court, should the parties fail to amicably come to an agreement on the same. It is so ordered.

Costs

The costs of an action are in the discretion of the Court (See S.30 of the Courts Act) and normally follow the event (See: Order 60 of the Rules of the Supreme Court). Both the parties having succeeded only

partly in their respective claims, this Court finds it only reasonable to order that each party should bear its own costs.

It is so ordered.

Dated this 31st day of May 2016.

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CHIRWA J
JUDGE