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MALAWI JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO 30 OF 2014

(Being High Court Commercial Cause No. 14 of 2012, Lilongwe Registry)

BETWEEN

MIKE APPEL & GATTO LIMITED……………………………………………APPELLANT

AND

SAULOSI CHILIMA…………………………………………………………RESPONDENT

GUAVA INTERNATIONAL LIMITED…………………………………………...THIRD PARTY

CORAM: **THE HON THE CHIEF JUSTICE AKC NYIRENDA SC**

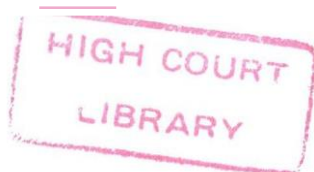
THE HON JUSTICE DR. JM ANSAH SC, JA

THE HON JUSTICE RR MZIKAMANDA SC, JA

Masumbu……………………for the Appellant

Dr. Silungwe………………...for the Respondent

Chimtande, Mrs…………….Recording Officer


HIGH COURT
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Chief Justice: Good morning Counsel. The matter is called this morning for Judgment but as you can see today we are joined by Chipeta SC, JA in place of Dr. Ansah SC, JA. The Indications are that Dr. Ansah SC, JA should be coming rather late. We did not want to keep counsel waiting and we sought the presence of Chipeta SC, JA who neither took part in the hearing of the appeal nor the preparation of the Judgment, but is here for purposes of completing the coram. The Judgment was prepared by myself, Justice Dr. Ansah SC, JA and Justice Mzikamanda SC, JA. One option was for me and Justice Mzikamanda SC, JA to walk in and deliver the Judgment. The Judgment will be delivered on behalf of this Court by Justice Mzikamanda SC, JA. I raise these issues because they have caused concern in some quarters. In so far as we are concerned, there is no difficulty with either option. I want to confirm with counsel on both sides if it is alright with you for us to proceed as proposed.

Dr. Silungwe: Good morning My Lords. My colleague is Mr. Francis Kaduya, sitting in for Counsel Masumbu for the Appellant. We were informed in advance by the Court Officials and both of us did not have any problem even if it was a panel of two to deliver the Judgment. That Chipeta SC, JA is sitting in for a member of the panel not present, we understand and both counsel for the Appellant and for the Respondent have no problem with that arrangement.

Chief Justice: Very well then. We will proceed to deliver the Judgment and as I said Justice Mzikamanda SC, JA will deliver it on behalf of the Court.

JUDGMENT

MZIKAMANDA SC. JA (Hon. Chief Justice Nyirenda SC and Hon. Justice Ansah SC., JA concurring)

This is an appeal against a judgment of 8th May, 2013 entered by Manda J of the High Court (Commercial Division), Lilongwe on summons for judgment on admission. The judgment was that the Respondent herein be given a brand new Range Rover Sport or an amount equivalent to the purchase price of such a vehicle at the market value as of the time of judgment. The Respondent was also awarded damages for loss of use of the Range Rover and costs of the action. The appeal is opposed.

There were filed seven grounds of appeal as follows:

(1) That the learned Judge erred in law when he held that the e-mail between the defendant and the Third Party in which was contained the alleged admission of liability was admissible as evidence

(2) Without prejudice to ground 1 hereof, that the learned Judge erred in law when he failed to exercise his discretion to exclude from evidence the aforesaid e-mail in terms of Order 16 Rule 1(2) of the High Court (Commercial Division) Rules.

(3) That the learned Judge erred in both law and fact when he held that the contents of the e-mail aforesaid amounted to a clear and unequivocal admission of liability by the defendant.

(4) That the learned Judge erred in law when he relied on the provisions of the Consumer Protection Act to fashion out a remedy for the Plaintiff when the same had not been pleaded by the Plaintiff.

(5) That the learned Judge erred in law when he held that there was implied into the contract of sale of a motor vehicle between the Defendant and the Plaintiff warranties and or conditions that the said vehicle would be fit for its intended purpose and that it would be of merchantable quality.

(6) Without prejudice to ground 5 hereof, that the learned Judge erred in both law and fact when he held that the Defendant was in breach of implied warranties and or conditions that the vehicle sold to the Plaintiff by the Defendant would be fit for purpose and that it would be of merchantable quality.

(7) That the learned Judge erred in law in ordering the Defendant to give the Plaintiff a brand new car as a remedy for the alleged breach of implied conditions and or warranties as to fitness for purpose and merchantable quality.

The Appellant seeks the reversal of the judgment and findings made by the Court below and directions on the further conduct of the matter in that Court.

The background of the matter is that the Respondent purchased a brand new Range Rover Sport HSE luxury vehicle from the Appellant. It is common case that shortly thereafter the said vehicle developed various faults and had to be taken back to the Appellant for repairs on a number of occasions, to no avail. The Respondent then engaged the services of an expert to inspect and evaluate the vehicle. The results of the technical inspection are contained in a report marked Exhibit CMS 1, to which there is no dispute. Among the findings contained in the report were that the reversing camera was unserviceable, just as the rear windshield spoiler was bonded with adhesive re-bonding, with numerous nicks and dents visible on the spoiler surface. The near side rear pillar trim panel was adrift and grease prints were still visible, while rear windows were misrigged. Wire harness were found not secured

in engine compartment and the vehicle was veering to nearside with hands off the steering wheel regardless of road camber during test drive. There was heavy judder and steering shimmy when brakes were applied gently from 80 kilometres per hour through to 120 kilometres per hour. There was 'clonking' noise emanating from front suspension on start-off and reversing and vibration was evident at low speeds. Amplitude of vibration increased with the vehicle in low gear drive setting and there was rumbling and rattling noise throughout the vehicle, indicating unsecured panels. There was also 'clonking' noise when steering wheel was turned full right, with steering becoming very sensitive at speeds exceeding 130kilometers per hour.

Physical inspection revealed uneven front near side tyre wear, with tyre wearing on the inside and this confirmed that the vehicle was out of track and pulling to the near side. Three fasteners securing sump guard were missing and the front suspension arm was skewed, with the left hand appearing about 12 centimetres lower than the right hand arm. Front suspension lower arm inner bushes were fitted incorrectly as the bush was not centred with housing. Left Hand Side (LHS) front lower shock absorber attachment bolt was fitted facing fore while Right Hand Side (RHS) was fitted facing aft when both should have been facing aft. LHS brake sensor was detached and harness not secure. RHS drive shaft rubber boot was secured with plastic ratchet straps instead of metal strap, resulting in extensive lubricating grease splash which contaminated the RHS lower arm bearing, effectively rendering it unserviceable. RHS and LHS hub disc exhibited extensive oxidation (surface corrosion). Both front hub nuts were not locked to the drive shafts as is the standard practice and there was evidence that the nuts were working loose.

The vehicle was taken to the Appellant's garage in Lilongwe where the defects were pointed out to the Appellant's Branch and Workshop Managers. At the time

the defects were detected by the expert, the vehicle had only covered 13, 460 kilometers since its first registration. The experts concluded that the vehicle was not roadworthy and was unsafe to be driven because it displayed serious defects that affected the suspension, brake and steering systems and therefore general handling.

The Respondent was of the view that the Appellant breached implied conditions of their agreement that the vehicle had to be brand new, reasonably fit for the purpose for which he required it as a luxury vehicle and that it should be of merchantable quality. The Respondent thus considered that he was entitled to reject the motor vehicle, which he did in a letter of 24th February, 2012, demanding a replacement with a brand new vehicle or payment of the purchase price on basis of market value. He commenced an action in the High Court (Commercial Division) where he filed a writ of summons itemising his claims. The statement of claim particularised twenty-one defects on the otherwise brand new motor vehicle.

On 3rd July, 2012, the Appellant filed and served a defense to the action. In it the Appellant admitted that it was a company limited by shares whose core business was motor vehicle sales and maintenance, and that, at all material times, it was the holder of a franchise of the Land Rover brand of motor vehicles in Malawi. The Appellant averred in the defence statement that the Respondent was at all material times fully aware and accepted that the manufacturer of the Range Rover HSE herein was to be, and in fact was, Land Rover, Jaguar Land Rover Group of UK, marketing in Malawi Land Rover and Range Rover new vehicles through Guava International Limited, with it as authorized agent. It admitted that by an agreement made in November, 2010, it agreed to sell to the Respondent a brand new Range Rover Sport HSE which was, after purchase , registered with Registration Number SKC 9993 for US$200,000 (United States Dollars Two Hundred Thousand). It

admitted having sold and effected delivery of the said vehicle to the Respondent as a brand new vehicle. It averred that the vehicle was brand new and in perfectly merchantable condition when it was delivered to the Respondent. The defence averred, inter alia, that the defects particularized in the statement of claim were in fact matters that arose from the Respondent's own maintenance of the vehicle as well as extensive and rough usage of the vehicle such as driving at unreasonably high speeds. The defence specifically denied that the vehicle was not fit for its purpose and not of merchantable quality at the time of purchase. The defence also averred that the Appellant was only a dealer who effected the sale to the Respondent after having procured the said vehicle from Guava International Limited and the said sale being expressly subject to the terms and conditions of the manufacturer's warranty. Under the warranty, the Appellant was authorized repairer in the event of any defect being detected within the warranty period of 3 years or 100,000 kilometers of use whichever is the earlier. Thus the Appellant denied the claim for replacement of the vehicle or return of the purchase price as well as for loss and damage.

On 2th February, 2013 the Respondent took out a summons for judgment on admission returnable on 13th March, 2013. The affidavit in support of the summons exhibited the report of the expert who inspected and evaluated the vehicle as Exhibit CMS 1 and an e-mail correspondence between the Appellant and Guava International Limited but not addressed or copied to the Respondent, in which the Appellant complained about the faults in the vehicle in question and described the braking system failure as a factory fault. The affidavit in support averred inter alia that the Respondent having commenced the present proceedings for breach of conditions of merchantable quality of goods and fitness for use in the contract of sale, the Appellant having admitted that the motor vehicle in question was not fit

for purpose and was not of merchantable quality, the Respondent was entitled to judgment on the basis of admission because the Appellant had no defence to the claim.

The Appellant opposed the application for judgment on admission in an affidavit in opposition in which it was averred that the application was misconceived and ought to be dismissed with costs. The challenge to the application was mainly premised on the admissibility of Exhibit CMS2 which was said to be a confidential correspondence sent to Guava International Limited and not to the Respondent. Neither was it copied to the Respondent. The said Exhibit CMS2 must have been improperly and illegally obtained by the Respondent in circumstances amounting to breach of privacy. The affidavit in opposition exhibited a copy of Exhibit CMS2 as Exhibit TM, complete with the addresses of the intended recipients and the relevant confidentiality notice at the end, which the Respondent must have conveniently omitted to include. Further the affidavit in opposition averred that even on the face of it and reading it within its appropriate context, Exhibit CMS 2 cannot be said to amount to an unequivocal and clear admission as is required by the rules. Further still, none of the Appellant's officers at any time within or outside the action ever made any admission of liability as alleged by the Respondent.

The Court below heard the application for judgment on admission and ruled in favour of the Respondent. The Court entered judgment for the Respondent and ordered the Appellant to give the Respondent a brand new Range Rover Sport or an amount equivalent to the purchase price of such a vehicle at what was the current market value at the time of judgment. The Court also awarded damages for loss of use of the Range Rover and costs of the action. The Appellant was

dissatisfied with this decision and appealed against the whole of it, praying for its reversal and directions for further conduct of the matter in the Court below.

In his submissions before us, Counsel for the Appellant said that the judgment on admission was based on an e-mail the Appellant sent to Guava International Limited to which the Respondent was not among the addressees and that the only way the Respondent could have accessed it was through improper, illegal or unlawful means. The e-mail contained a confidentiality notice at the end. Counsel made reference to the pleadings, including the defence the Appellant filed against the claim. He made reference to, among other things, the fact that the Appellant was at all material times an authorized agent of Guava International Limited, selling vehicles whose manufacturers were Jaguar Land Rover Group of the UK. The motor vehicle in question was supplied together with a warranty booklet setting out the aspects of the sale of the vehicle in so far as the warranty was concerned. The Appellant also put up a complete denial of the purchase price in the defence. Counsel submitted that there were a lot of legal issues raised by the parties which could not be resolved at the stage of judgment on admission. There was no reply to the lengthy defence.

The admissibility of Exhibit CMS2 was disputed at the hearing of the summons for judgment on admission, firstly on the ground that the e-mail came under the protection of the right to privacy under section 21 of the Constitution and secondly on the basis of English case authorities cited as well as Order 16 of the High Court (Commercial Division) Rules which could have allowed the Court to refuse admission of the e-mail. Counsel further argued that even if the Judge were to find that the e-mail was admissible in evidence, the e-mail did not contain a clear and unequivocal admission by the Appellant. It supports the contention that the Appellant was only agent of a disclosed principal and that the present case was

only a warranty case for the manufacturers to deal with. In the view that Counsel holds, the Appellant should not be held liable for a factory fault referred to in the e- mail as regards the vehicle in question as this is covered under the warranty.

Counsel also faulted the Court below for making extensive reference to the Consumer Protection Act and its provisions when none of the parties had raised it or had been asked to address the Court on it. In any event the first point of call under the Consumer Protection Act is the Subordinate Court, not the High Court, so Counsel argued.

In his submissions before us, Counsel for the Respondent said that in the Commercial Court there is a philosophy to resolve commercial disputes cheaply, expeditiously and fairly. He submitted that in fact Exhibit CMS2 formed part of the court record because it had at some point been admitted by the High Court (Commercial Division) in an earlier hearing of some application before Chikopa J, as he then was. It was argued that the exhibit is also admissible under the provisions of Order 16 of the High Court (Commercial Division) Rules. Counsel further argued that litigation not being a cat and mouse game, there is an obligation on parties to make a full and frank disclosure that will require volunteering information that would not necessarily enhance one's case. The confidentiality notice at the end of the e-mail is not relevant as the circumstances under which Exhibit CMS2 came under custody of the Court were known in the Court below. The Appellant must have omitted it at the preparation of the record of appeal. A mere allegation that the document must have been improperly, illegally or unlawfully obtained cannot lead to a conclusion that it was so obtained. The party who alleges needed to show the impropriety. The Appellant had demonstrated no such impropriety. The Court below had properly exercised its discretion under Order 16 of the High Court (Commercial Division) Rules when it admitted Exhibit

CMS2 in evidence. Further still, it was argued that the right to privacy is always subject to limitation under established rules of international law and practice as well as in an open and democratic society. In the present case there was no such breach of privacy as would prevent the admission of Exhibit CMS2.

In order to assess whether the e-mail amounts to a clear and unequivocal admission, the Court must consider Exhibit CMS2 in its totality. The use of the term 'factory fault' with respect to the vehicle in question points to a defect in the product in ordinary terms. He submitted that under section 16 of the Sale of Goods Act, warranty may mean implied condition and a seller is not absorbed of liability merely by warranty. In the present case, Counsel submits, liability remains with the Appellant as seller, more particularly so because the Appellant is a seller who professes expertise.

As regards the application of the Consumer Protection Act by the Court below, Counsel submitted that it was incorrect to suggest that the Court was on a frolic of its own. Earlier skeleton arguments in another application in the same case had referred to the Act. He further submitted that the Consumer Protection Act has not ousted the jurisdiction of the High Court and the arguments on the applicability of the Act as advanced by the Appellant are misconceived.

As regards the purchase price, Counsel for the Respondent argued that the claim was for replacement with a brand new Range Rover HSE luxury motor vehicle and in the alternative refund of the purchase price.

We observe that it is trite that an appeal to this Court is by way of rehearing. We will thus subject the material before us to fresh scrutiny and make our own assessment, without being bound or limited in any way by the findings of the Court below. In doing so, however we will bear in mind the advantage that the Court

below may have enjoyed as Court that heard the summons for judgment on admission.

The summons for judgment on admission in the Court below was made under Order 27 rule 3 of the Rules of the Supreme Court. It is settled law that for the Court to enter judgment on admissions, the admissions, which may be express or implied, must be clear and unequivocal (see **Construction and Development Limited v Munyenyembe** 12 MLR 292 at 296). The admissions may be in the pleadings or may also be made in any other way, including through letters, and at any time. In any given case the Court will look at all the circumstances in determining whether there is an admission or not. We do not think that an indemnity sought by defendant from third party can be a bar to judgment on admissions for the plaintiff. A court can entertain an application for judgment on admission where there is no genuine dispute of the facts (see **Chiwaya v Mvula** [2004] MLR 52). It is for the Court to determine whether in all the circumstances of the case there is no genuine dispute of the facts.

The present appeal is premised on the admissibility of an e-mail marked Exhibit CMS2 and whether the contents of the same amount to a clear and unequivocal admission. The Court below had observed in its judgment at page 4 of the script that the summon s for judgment on admission was based on Exhibit CMS2. The appeal is also premised on what is said to be an unsolicited reference to the Consumer Protection Act by the Court below, which reference then appeared pivotal to the determination of the summons for judgment on admission.

The Court below identified the issue for determination under the summons as to whether there was an admission by the Appellant that the vehicle which the Respondent bought from them was not of merchantable quality and that the same

was not fit for the purpose that it was bought for. It was an extension of that issue, as the Court below considered, that if the vehicle was not of merchantable quality and not fit for purpose, then there was the breach of contract of sale under the Sale of Goods Act and, further, that there was also the violation of the Consumer Protection Act.

In dealing with an objection to the admissibility of Exhibit CMS 2 the Court below said that it did not see the confidentiality notice to be the basis of the objection. It had expected the confidentiality notice to be above the title of the Exhibit CMS2. The Court also observed that the Appellant did not deny the truthfulness of Exhibit CMS2 and never argued that it was not relevant to the case. The Court below observed that the principle of the fruit of the poisonous tree applicable elsewhere, that evidence which may have been obtained illegally or improperly is inadmissible regardless of relevance or that it can assist the court in determining the matter fairly and justly, is generally not applicable in English common law. In the present case, apart from the assertion than the Exhibit CMS2 may have been obtained illegally or improperly, the Appellant did not make any suggestion as to how the Respondent could have unlawfully or improperly obtained the document. Neither did the Appellant show that the document was privileged. The Court found that Exhibit CMS2 was not an obvious confidential document to be given automatic privilege. What is contained at the end of the document is a disclaimer which tends to be ignored. The Court was of the view that as the document contained a statement that the vehicle the Respondent bought had a factory fault, the Appellant had an obligation to disclose this fact to the Respondent. The Appellant failed in that duty by not so disclosing. The Court then ruled that Exhibit CMS2 was admissible.

The Court below found that there was an express, clear and unequivocal admission by the Appellant that the vehicle which was sold to the Respondent was unsafe to be driven and hence not fit for its purpose and that the same was not of a merchantable quality.

Regarding the admissibility of Exhibit CMS2 we want to observe that trial is a principal method of resolving disputes, the overriding purpose being to ascertain the truth. Whether to admit or exclude evidence in a trial remains a matter of discretion for the Court. Where evidence is obtained illegally, improperly or unfairly two opposing views exist, one in favour of admitting the evidence as long as it is relevant and necessary, and the other view is to exclude it regardless of its relevance and whether it is necessary. The former position represents English common law while the latter represents the view that rejects the fruit of the poisonous tree in some jurisdictions. There has been a plethora of academic discourse on the subject. Sometimes this is considered to be the battle between search for truth and the need to observe the due process of the law. Malawi has over time followed the English common law position that a Court will exercise discretion to admit relevant evidence if in its view the probative value outweighs the prejudicial effect. That remains the position under Malawi law. We think that this position is supported by Order 16 of the High Court (Commercial Division) Rules. This position tends to set the essentials of justice above technical rules, if strict application of the latter would operate unfairly and unjustly against the opposing party.

We have examined the reasoning of the Court below in admitting Exhibit CMS2. We are in agreement that the document was admissible in evidence and could be relied upon in the determination of the summons for judgment on admission. Like the Court below, we do not find any basis for holding that Exhibit CMS2 is a

privileged document. We do not think that the disclaimer at the end of the document would preclude the Respondent from using it when the said document is discussing the vehicle he had numerous problems with and which is stated to have factory fault. It was one of the documents listed for discovery but to which the Appellant objected citing privilege. We find it particularly telling that the assertion by Counsel for the Respondent, that the same document Exhibit CMS2 was used in previous court proceedings before Chikopa J, as he then was, in an earlier application within the present case has not been contradicted by Counsel for the Appellant. It was instead suggested that those proceedings had nothing to do with the hearing of the summons for judgment on admission. That suggestion appears unsustainable.

Indeed the assertion that the document might have been obtained illegally or improperly has no basis and remains a matter of speculation. Nothing was said in the Court below and in this Court to show why the Appellant allege illegality or impropriety on the part of the Respondent. On the suggestion that the Respondent may have obtained the document in violation of the right to privacy as provided for under section 21 of the Constitution, we are unable to find any material on the record to support such an assertion.

We are of the view that the discussion above points to the need for the Respondent to have had access to all relevant documents that had an important bearing on his case, Exhibit CMS2 being one of such documents.

We have considered all the material before us in respect of this appeal. The defence filed makes certain admissions which are relevant to the determination of the summons. Those admissions arc reinforced by the Appellant's skeletal arguments on appeal against judgment. For example in the section on background,

it is stated by counsel for the Appellant that "the respondent purchased a Range Rover Sport HSE from the appellant but shortly thereafter the vehicle developed various faults and had to be taken back to the appellant for repairs on several occasions to no avail".

The evidence shows that all the problems the vehicle had occurred within the first 9,000 kilometers from the time of first registration and yet according to the warranty the vehicle should have been relatively problem free for the first 100,000 kilometers. In fact according to Exhibit CMS1 which was not challenged by the appellant at 13,460 kilometers the vehicle was not roadworthy as it displayed serious defects of various descriptions and was unsafe to drive. Yet at the time of taking delivery it was a brand new Ran Rover HSE luxury vehicle.

The defence does not deny any of these defects, but instead it attributes them to the Respondent. It is common case that sho1tly after the brand new motor vehicle was sold to the Respondent, it exhibited numerous faults which could not be repaired despite the Appellant's best efforts. We do not think that there is any dispute that the Appellant sold what was a brand new Range Rover HSE luxury vehicle to the Respondent. It is quite evident that this so called brand new Range Rover HSE was not of merchantable quality and not fit for purpose for which it was bought, a luxury car. This is a vehicle that showed signs of disintegration at high speed, with the spoiler falling off and getting shuttered upon reaching the ground. This is a brand new vehicle whose breaking system failed and was unstable on the road with tyres wearing out on the inner side. Within 9,000 kilometers from time of its registration, the brand new vehicle exhibited numerous problems, including serious mechanical problems which the Appellant failed to rectify even with their best efforts.

The report by the expert who conducted technical inspection and Exhibited as CMS1 was never challenged. That report found the vehicle to be not roadworthy and unsafe to be driven. The expert had brought his findings to the attention of the Appellant's Branch and Workshop, Managers in Lilongwe. In all the circumstances, the finding by the Court below that the vehicle was not of merchantable quality and not fit for the purpose is merited. It is not in the least probable that the numerous and fundamental defects were caused by the Respondent within the short period he used the vehicle, covering 9,000 kilometers from first registration.

On the totality of the evidence before the Court, including the contents of Exhibit CMS2, we find that the Appellant admitted to have sold the Respondent the vehicle in question which had numerous and fundamental problems rendering the vehicle not roadworthy and unsafe to be driven, as described in Exhibit CMS1 brought to the Appellant's attention and which the Appellant never challenged. An admission that the Appellant sold the Respondent the vehicle which was not of merchantable quality and which was unfit for the purpose is to be implied from Exhibit CMS2 in which the Appellant stated that the vehicle had a factory fault.

The Appellant sought to argue that it was only an agent, and therefore not liable for breach of contract on grounds that the vehicle was not of merchantable quality and not fit for purpose. That argument is without support anywhere. As an agent, the Appellant would be jointly and severally liable for the breach herein. The Appellant’s defence lacks in merit when it attempts to shift responsibility elsewhere away from itself. Thus there is no defence raising any facts in dispute. Equally, we are unable to see any of the legal issues that Counsel for the Appellant suggested exist in this case. The Court below rightly found that there was clear admission of liability on the part of the Appellant.

We are of the view that it was not necessary for the Court below to make reference to the Consumer Protection Act in order for it to determine the summons for judgement on admission. It had sufficient material before it to determine the application without reference to the Consumer Protection Act. As such, we do not find it necessary to discuss the relevance and applicability of that Act in this appeal.

In all the above, we come to the conclusion that this appeal is without merit and must fail. We dismiss it with costs to the Respondent.

Pronounced in open Court at Blantyre this 23rd day of June, 2016.

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THE HONOURABLE THE CHIEF JUCTICE AKC NYIRENDA SC

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THE HONOURABLE JUSTICE DR JM ANSAH SC, JA

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THE HONOURABLE JUSTICE RR MZIKAMANDA SC, JA