

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO 3729 OF 2001**

MR REX VINYO .....PLAINTIFF

AND

UNITRANS MALAWI (LTD) .....DEFENDANT

**CORAM : M.A. TEMBO, THE ASSISTANT REGISTRAR**

**Mambulasa, Counsel for the Plaintiff**

Njobvu, Counsel for the defendant

**ORDER**

This is this Court's order on the plaintiff's application to reinstate its action herein. This application is supported by Mr Masumbu's affidavit. Mr Njobvu of Counsel for the defendant strongly orally opposed the present application. The plaintiff herein had commenced two actions in the High Court against the defendant on the basis of the same facts. The actions are the present one and an earlier one under Civil Cause Number 1012 of 1998. In the letter action the plaintiff was represented by Chagwamnjira and Company. After noting this state of affairs, the defendant sought in the present action and was granted, an order by which the plaintiff was to withdraw Civil Cause Number 1012 of 1998 within 14 days failing which the present action would be dismissed for being frivolous and vexatious for duplicity. That order was dated 4<sup>th</sup> February, 2003 and was made in the presence of Mr Masumbu of Counsel for the plaintiff in the present action.

On 10<sup>th</sup> February, 2003 Chagwamnjira and Company were notified to withdraw Civil Cause Number 1012 of 1998. It was only on 17<sup>th</sup> February, 2003 a day before the expiration of the 14 days allowed by this court that the firm of Chagwamnjira and Company by letter demanded for payment of their professional fees by the plaintiff before they withdrew Civil Cause Number 1012 of 1998. That letter reached the plaintiff's lawyers in this action on 20<sup>th</sup> February, 2003. And the defendant only filed his notice of discontinuance of Civil Cause Number 1021 of 1998 on 21<sup>st</sup> February, 2003 out of the time specified by this Court for doing so.

The defendant herein then filed a formal order dismissing the present action which is dated 7<sup>th</sup> March, 2003. On the instant application the defendant argued that the plaintiff's action herein is dead as there is a formal order dismissing it following the plaintiff's non-compliance with this Court's 14 days unless order. And further that this Court has no jurisdiction to resurrect the instant action because this Court became **functus officio** upon the perfection of the order dismissing the instant action. Mr Njobvu for the defendant cited the case of **Re VGM Holdings Ltd** 1941 3 ALLER 417 in that regard. He further argued that the only option open to the plaintiff was appeal to a judge against the order dismissing the plaintiff's action. And he cited the case of **Industrial Development Group v Consolidated Textiles** Civil Cause Number 1972 of 1999.

Mr Mambulasa on the contrary prayed for the reinstatement of the present action arguing that this Court should exercise its jurisdiction not to penalize the plaintiff for no fault of his own since no prejudice has been suffered by the defendant.

This Court has occasion to consider the question whether it has jurisdiction to revive an action after the failure of a party to comply with an unless order. With reference to the decision of **Lord Denning MR R v Bloomsbury and Marylebone County Court, Ex parte Villerwest Ltd** this court finds that it has such jurisdiction. And so if a condition on an unless order is not fulfilled within the specified time, the Court always has power to bring it to life again, by extending the time. See **Pryer v Smith** [1977] 1 WLR 425. But this power is not to be exercised anyhow. This power is exercised by this court where there are strenuous circumstances and not where the failure to comply is contumelious and intentional. See **Re Jokai Tea Holdings Ltd** (Note) [1992] 1 WLR 1196. And when such power is exercised this Court imposes stringent terms such as with regard to payment of costs since orders of this court are made to be obeyed and not to be lightly ignored. See **Samuels v Linzi Dresses Ltd** [1981] Q.B. 115. The old practice of appealing against the original unless order and if necessary applying at the same time for an extension of time in cases of the instant nature, as submitted by Counsel for the defendant, which was recognized a legitimate has become otiose and ought no longer to be resorted to. See Editorial Note 3/5/5 under 3 r 5 RSC. Upon a consideration of the history of this matter and the circumstances leading to the plaintiff's non-compliance

with this Court's 14 days unless order this Court finds extraneous circumstances warranting this Court's order bring back this plaintiff's action to life.

Although the plaintiff ought to be reprimanded for giving out duo instructions on the same facts, Chagwamnjira's slow response to the instructions to withdraw civil Cause No 1021 of 1998 is the cause of the plaintiff's non-compliance that resulted in the dismissal of the instant action. And it would indeed not be fair to penalize the plaintiff for a fault that is not entirely his.

This court therefore extends the time for the plaintiff herein to file its discontinuance in Civil Cause Number 1021 of 1998 to until the end of 7 days from the date of this order. The costs occasioned to the defendant by this order shall be awarded to the defendant.

At the same time to ensure that this court's orders as to time are seriously obeyed and not lightly ignored this Court shall make an order as to payment of costs of the defendant so far by the plaintiff. And so this Court orders that before the plaintiff takes any further steps in the present action after the discontinuation of Civil Cause Number 1021 of 1998 the plaintiff shall pay to the defendant all the defendant's costs incurred so far to be taxed if not agreed. Costs on the instant application are also awarded to the defendant.

Made in chambers at Blantyre this ..... December, 2003

M.A. Tembo

**THE ASSISTANT REGISTRAR**