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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 526 OF 1987



BETWEEN:

LABEL INDUSTRIES LIMITED PLAINTIFF

- AND -

SMALL ENTERPRISE DEVELOPMENT
ORGANISATION OF MALAWI (SEDOM) DEFENDANT

Coram: MAKUTA, CHIEF JUSTICE

Mr. Nyirenda of Counsel for the Plaintiff
Mr. Mandala of Counsel for the Defendant
Mrs. Liyao, Court Interpreter
Mrs. Gausi, Court Reporter

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J U D G M E N T

By a specially endorsed writ, the plaintiff claims damages for trespass to premises at Chirimba in the City of Blantyre and for damages to goods and for conversion by the defendant's servants.

The facts of the case are as follows. The defendant are financiers of small enterprises in Malawi. On or about 19th August, 1983, the defendant granted a loan in the sum of K9,000 to Mr. Felix Zalimba to purchase a Markem 155-1 fabric label printing machine. The machine was imported from the United States of America. Before its arrival, there was a devaluation of the Kwacha by 12 per cent and that automatically upset the loan because the cost went up. When the defendant were appraised of the situation they agreed to increase the loan to K20,000. According to Mr. Zalimba, the increase was on condition that Label Industries, the firm which he formed to run the industry, is incorporated into a limited company. The company was incorporated on 9th January, 1984 and a certificate of incorporation, exhibit P2, was issued by the Registrar of Companies. The certificate was presented to the defendant and subsequently Mr. Zalimba was invited to sign a loan agreement, exhibit P3. The recital shows that the agreement had been entered into on 20th February, 1984, between the defendant and Label



Industries. The signing, however, was done on 3rd April, 1984, between Label Industries Limited and the defendant. Mr. P.C. Oakley and Mr. P.D. Coote, signed on behalf of the defendant. Mr. F.L. Zalimba signed on behalf of Label Industries Limited.

The agreement has two schedules. The first schedule shows the purpose of the loan and the second schedule shows the nature of security to be given. There are three items under the second schedule viz:-

- 1) Registered Bill of Sale over all equipment owned and to be purchased;
- 2) After incorporation a debenture over all assets is to be taken and Directors' guarantees;
- 3) Adequate insurance is to be arranged by the borrower with SEDOM's interest noted.

The debenture was not raised but a Bill of Sale was prepared by Messrs Wilson & Morgan and Mr. Zalimba together with his wife, in their capacity as directors of Label Industries Limited, were requested by the defendant to go and execute it at Messrs Wilson & Morgan. The Bill of Sale is dated 4th May, 1984. The plaintiff were supposed to repay the loan in 48-monthly instalments of K556 by a bank stop order. There was an occasion when the plaintiff, due to economic factors, failed to meet their obligations and the bank was advised accordingly by letter jointly signed by the plaintiff and defendant. That was in or about July, 1984.

The defendant denies liability. Mr. Cuthbert Mhango, DW1, informed the court that in 1983 he was an Extension Officer and he used to appraise projects and advise clients thereon. In the same year Mr. Zalimba was granted a loan of K9,000. It was then discovered that the money was insufficient and an additional K11,000 was granted, making a total of K20,000. This was on condition that a limited company be incorporated and there was instruction not to disburse the money until this was done. This was because at the material time the maximum the defendant could lend was K25,000 and K20,000 was getting close to the K25,000. It was therefore felt that it would be risky to lend that amount to an individual. After incorporation everything was in the name of Label Industries Limited and not in the name of Zalimba.

The second defence witness was Mr. Dave Nyirenda. At the material time he was a Loans Officer. He testified that he used to appraise, monitor and chase defaulters. The plaintiff happened to be one of the defaulters. The business was performing poorly and no payments were forthcoming. Subsequently, Mr. Zalimba wrote to the defendant stating that he intended to abandon the project. On 31st July,

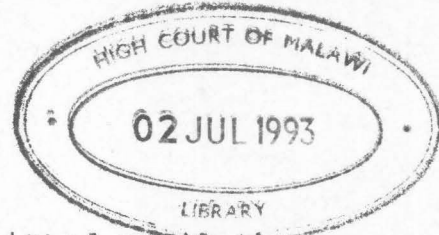


1984, he accompanied Mr. Zalimba to the company's premises at Chirimba to collect the equipment and the raw materials.

Mr. Mandala, on behalf of the defendant, argued in the course of the trial that there was no agreement because the contract relied upon was concluded before the company was incorporated and any such pre-incorporation contract is not binding. For any pre-incorporation contract to be binding there must be novation and there was none in the instant case. Further, the contract was between Mr. Zalimba and the defendant and it was Mr. Zalimba who applied for adjustment of the loan to K20,000. All this was done before the incorporation of the company. After incorporation, Mr. Mandala argued, there has been no evidence to show that the business of Label Industries was assigned to Label Industries Limited and there is no evidence that Label Industries ceased to do business.

Close examination of the facts reveals that after the terms and conditions of the loan were offered to Mr. Zalimba and were accepted by him, there was a change of circumstances. It became apparent that the loan would not be sufficient because of the devaluation of the Kwacha and the loan was adjusted. One of the terms and conditions of the loan was that a formal loan agreement between Label Industries and SEDOM was to be entered into in due course. But because of the adjustment it was felt that it would be prudent to lend the K20,000 not to an individual but to an incorporated company. This was to enable the defendant to have sufficient security for the loan. There is no dispute to this evidence. Mr. Zalimba testified to this effect and Mr. Mhango, the defence witness, also testified to the same effect. It would appear that the process of incorporating the company delayed the finalisation of the loan agreement. The agreement was concluded on 3rd July, 1984. The insistence on incorporation before disbursement of the money meant, in my opinion, that rights and obligations would be transferred to the company only after incorporation and on signing of the agreement. It is also observed that on 3rd April, 1984, probably after execution of the loan agreement, the plaintiff executed a standing order, exhibit P6, to the Bank requesting the bank to remit to the defendants K556 every month. It was Mr. Zalimba's evidence that it was the defendant's Loans Officer who prepared the standing order at the defendant's office and Mr. Zalimba was made to sign on behalf of the plaintiff. The defendant did not deny this. Mr. Zalimba signed just above Label Industries Limited rubber stamp. Further, when the company was not able to meet its obligations a letter, exhibit P7, jointly signed by Label Industries Limited and the defendant was sent to the Manager of Commercial Bank, Blantyre, requesting the bank to suspend payments due in August and September, 1984.

In the light of these facts it is not correct, in my opinion, to contend that the business of the Company was not assigned to Label Industries Limited. Further, in view of



the fact that no disbursement was permitted until the company was incorporated, it is not correct to contend that Label Industries did not cease to do business. In the circumstances of this case, the defendant cannot turn round and deny the existence of the contract. In my view Mr. Mandala's contention has no merit.

In view of my finding that there was a loan agreement between the plaintiff and the defendant, the machine and raw materials belonged to the Plaintiff and not to Mr. Zalimba.

So far as the Bill of Sale is concerned, Section 23 of the Bill of Sale Act, (Cap 48:03) provides as follows:-

"... Nothing in this Act shall apply to any debenture issued or charge created by a body incorporated by or under any law, and secured upon the capital, stock, goods, chattels, effects or other assets of such incorporated body, which debenture or charge is required to be registered under any written law relating to incorporated bodies."

Label Industries Limited is an incorporated body and it is, in my view, clear that a bill of sale cannot apply to property of an incorporated company. The bill of sale was therefore void and the seizure was unlawful.

It is observed that the defendant, in their letter, exhibit P11, to Messrs Savjani and Company dated 18th March, 1986, purported to avoid liability of the seizure by ignoring the incorporated company and the agreement. The letter reads thus:-

"Dear Sir,

FELIX ZALIMBA, TRADING AS LABEL INDUSTRIES LIMITED

We acknowledge receipt of your letter of 28th February, 1986.

SEDOM's Letter of Agreement dated 19th August, 1983, was between Mr. F. L. Zalimba and SEDOM, not Label Industries Limited which had not been incorporated at this time.

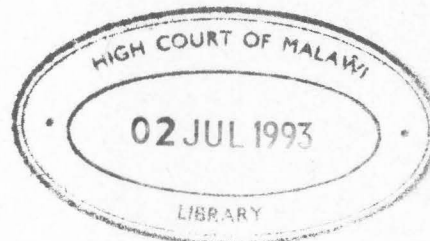
All assets of the business were handed to SEDOM by Mr. Zalimba as an individual and in his capacity as our borrower. (We did not seize the item of equipment under the Bill of Sale held by SEDOM).

If you are acting for Label Industries Limited, and not Mr. Zalimba, we regret that we are unable to assist you further in your enquiries.

Yours faithfully,

(SIGNED)

P.C. Oakley
for GENERAL MANAGER"



cc: Sacranie, Gow and Company,
P.O. Box 5133,
LIMBE."

It is in evidence that at the time this letter was written Label Industries Limited had already been incorporated at the behest of the defendant. The assets and liabilities had already been transferred to it. Mr. Zalimba had no assets to be seized. One can only conclude that the defendant had, by this time, realised that they had made a mistake.

I now turn to trespass and conversion. Mr. Zalimba informed the Court that on 30th July, 1985, he had gone to Zomba on business and on return he found a note, exhibit P17, from the defendant informing him that they wished to place a security guard at the plaintiff's premises during the night. He was asked to call at the defendant's office the following morning to finalise the arrangements. The letter reads as follows:-

"SMALL ENTERPRISE DEVELOPMENT ORGANISATION OF MALAWI
P.O. BOX 525
BLANTYRE

30.7.85

Felix Zalimba ,
Label Industries,
Blantyre.

Dear Felix,

We attempted to contact you today just to let you know that we wish to place a security guard at your premises during the nights.

Could you call into our office tomorrow morning at 7.30 a.m. in order that we can finalise arrangements.

Regards

P. C. Oakley"

At about 7.00 a.m. a vehicle from the defendant arrived at his house and Mr. Nyirenda was in it. Mr. Zalimba was asked to get into the vehicle and on arrival

at the defendant's office he was taken to Mr. Oakley's office. Mr. Oakley told him that the plaintiff's creditors were pressing for payment and some had gone to the defendant, knowing that they, i.e. defendant, were the financiers. Mr. Zalimba was therefore prevailed upon to sign a letter authorizing the defendant to manage the affairs of Label Industries Limited until the creditors were paid off and management would then revert to him. Mr. Zalimba asserted that he was not given an opportunity to consider the implications of the letter he was made to sign. The question of placing a security guard at the plaintiff's premises was not mentioned. The letter, exhibit P8, which he was made to sign reads thus:

"

Label Industries
Blantyre
29th July, 1985

The General Manager,
SEDOM,
P.O. Box 525,
Blantyre.

Dear Sir,

LABEL MANUFACTURING PROJECT

Due to circumstances beyond my control I am unable to continue meeting my monthly repayment commitment to SEDOM.

I therefore wish to hand over to SEDOM the Markem 155 machine plus all raw materials and furniture associated with the business, towards the discharge of my outstanding debt.

I hereby authorise SEDOM to collect the machine, raw materials, and all furniture relating to my business from the premises from which I operate at Chirimba.

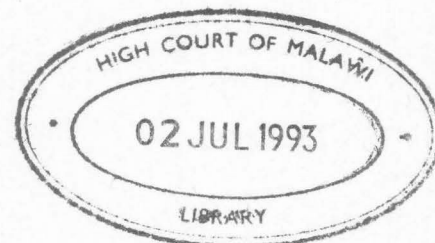
Yours faithfully,

Signed)

FELIX ZALIMBA

CC: L. Mgawa"

It is observed that it was on the basis of this letter that the property was seized because in their letter to Messrs Savjani & Company, exhibit P11, the defendant mentioned that all assets of the business were handed to SEDOM by Mr. Zalimba as an individual and in his capacity as a borrower. But it must be recalled that at this time Mr. Zalimba had no assets to hand over. The assets belonged to Label Industries Limited. Whatever



Mr. Zalimba did was done in his capacity as managing director. The defendant knew this. If Mr. Zalimba purported to act on his own behalf the defendant should have raised strong objections. If they did not object they colluded to the wrong doing.

It is significant to observe that on 22nd August, 1985, Mr. Zalimba wrote to the defendant enquiring what technical assistance they intend to give to revive the business. It would appear there was no reply to the letter. One would have expected a reply to the letter to clarify the position. Instead of some clarification, the equipment together with the raw materials were sold to Manufacturing Industries Limited for K16,927. The plaintiff were advised of the sale by letter subsequently.

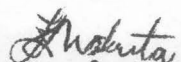
Trespass to land consists an unjustifiable intrusion by one person upon the land of another. I have already found that the seizure of the equipment and raw materials were unlawful. It follows, in my view, that the entry on to the premises for purposes of doing an unlawful act was trespass ab initio: Elias v Passmore (1934) 2 KB 164. Further the sale of the equipment and raw materials amounted to a conversion.

I now turn to damages. The damages to which a plaintiff who has been deprived of his goods is entitled are prima facie the value of the goods, together with any special loss which is the natural and direct result of the wrong: Re. Simms (1934) 1 Ch.1. In the instant case the equipment and the raw materials were sold for K16,927. This, in my view, is the amount the plaintiff is entitled to.

On trespass, I have already found that the entry on to the premises to take possession of the property was trespass. Further, Mr. Oakley wrote to Mr. Zalimba that the defendant intended to place a security guard. Mr. Zalimba testified that a security guard was actually placed on the premises and a lock on the door was changed. This is not disputed. This was an unjustifiable intrusion on the plaintiff's premises. I therefore, award K300 for trespass.

I therefore enter judgement in the sum of K16,927 plus K300 which comes to K17,227. The plaintiff will have costs of this action.

PRONOUNCED in open Court this 11th day of January, 1991, at Blantyre.


F. L. Makuta
CHIEF JUSTICE