

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

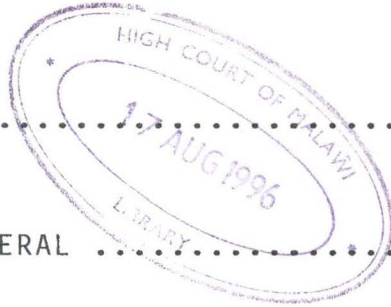
CIVIL CAUSE NO. 616 OF 1994

**BETWEEN:-**

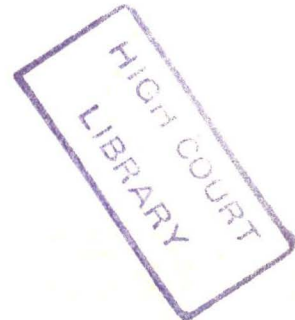
L. CHAPONDA ..... PLAINTIFF

- and -

THE ATTORNEY GENERAL ..... DEFENDANT



**CORAM:** MRS A.S.E. MSOSA, J.  
Mandala, Counsel for the Plaintiff  
Chigawa, Counsel for the Defendant  
Mkwepuh, Official Interpreter  
Katunga (Mrs), Recording Officer



JUDGMENT

The plaintiff claims damages for wrongful conversion of his shares in Southern Bottlers (Mw) Ltd and for wrongful conversion of his real property. The plaintiff by his Statement of Claim pleads that he was the owner of shares numbers 55045 to 55294 and 58177 to 58326 in the then Nyasaland Bottlers Limited. He held these shares under share certificate number 119 to 126. The plaintiff was also owner of four real properties held by him under title deeds number 28837, 27050, 26923 and 22573.

The plaintiff's property was declared forfeit to the Malawi Government by an order of the Minister responsible for the administration of the Forfeiture Act which has since been repealed. The plaintiff contends that the Forfeiture order was made in bad faith as he was neither a threat to the National Economy nor a threat to Public Security. He further contends that the Forfeiture Order was unlawful and unconstitutional. He further states that it was by reason of the unlawful order that his shares in Nyasaland Bottlers Limited were sold by the Administrator General at £400 in 1966, and that the said sum of £400 together with dividends were converted by the Malawi Government to its own use. The plaintiff also contends that it was by reason of this order that the Malawi Government expropriated his real property for the use of members of the now disbanded Malawi Young Pioneers and the Chinese Agricultural Mission in Malawi.

The plaintiff claims;

- (a) a declaration that the forfeiture order was unconstitutional and unlawful;

- (b) damages for conversion of the shares;
- (c) the return of his property; and
- (d) in the alternative, damages for conversion of the real property.

The defendant in his defence, denies that the forfeiture order was made in bad faith, or that it was unlawful and unconstitutional. The defendant further denies that the plaintiff's shares were wrongfully converted by the Government. The defendant states that the plaintiff was lawfully made a subject of forfeiture and consequently, by law, the property vested in the Administrator General who had powers to dispose of it. The defendant states that under Section 7 of the Forfeiture Act, no suit could be brought against the Government. The defendant further states that according to Section 209 (2) (b) as read with Sub-section (4) of the Constitution, the rights in the property of persons who were subjected to the now repealed Forfeiture Act vest in the National Compensation Fund, and that as such the property should be disposed of in accordance with the principles, procedure and rules of the National Compensation Tribunal as provided in Section 138 of the Constitution. The defendant also states that the plaintiff's claim is statute barred by the operation of Section 4 (1) of the Limitation Act.

The plaintiff, in his reply, denies that his rights are vested in the National Compensation Tribunal. He states that he instituted this action prior to the commencement of the 1994 Constitution of Malawi. The plaintiff states that he only learnt that his property was forfeited on or about 24th January, 1994. He consequently contends that the course of action accrued on that date and therefore Section 4 of the Limitation Act does not apply.

The plaintiff is a businessman and has been such for a very long time. He testified that in 1962, he owned fifteen lorries, several houses, groceries and a maizemill. All these properties were in the City of Blantyre. He also had 400 shares in Nyasaland Bottling Company which is now known as Southern Bottlers.

In 1964 the plaintiff went to Zambia to open some additional businesses. It was whilst he was in Zambia that he learnt that, all his dogs were killed. He was further warned that it was not safe for him to return to Malawi. He therefore stayed in Zambia and only returned to Malawi in 1993. According to him, it was after his return that he learnt that by an order of the Minister responsible for the administration of the Forfeiture Act, his property was forfeited to the Malawi Government in November, 1966.

The facts of this case are not in dispute. The defendant readily admitted the facts as pleaded by the plaintiff and called no witnesses.



The main issue is the application of the Forfeiture Act on the defendant and his property. The question is whether it was constitutional having regard to the provisions of the constitution that existed at that time. Section 2(1) of the Constitution which has since been repealed laid down the fundamental principles of the Government. For the purpose of the present case the following sub-sections thereto are relevant:

- "(iii) The Government and the people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights and of adherence to the Law of Nations.
- (iv) No person should be deprived of his property without payment of fair compensation, and only where the public interest so requires."

There was a saving clause to the above provisions which was as follows:

"(2)-Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub-section (1) to the extent that the law in question is reasonably required in the interests of defence, public safety public order or the national economy."

The Forfeiture Act gave powers to the Minister to declare, by order published in the Gazette, a person to be subject to forfeiture if he was satisfied that the person to be forfeited had been acting in a manner prejudicial to the safety or the economy of the State or subversive to the authority of the lawfully established Government. The Minister had powers to make the declaration whether the person was within or outside Malawi. I am of the view that these powers did not *per se* contravene the above constitutional provisions in view of the proviso.

The position was that the constitution allowed the Government to deprive a person of his property if it was in the public interest provided the person was compensated. Further the constitution by the proviso allowed the law that could have appeared inconsistent with the provisions of Section 2 (1) if such law was reasonably required in the interests of defence, public safety, public order or the national economy.

It is clear that the proviso was necessary because it was under this proviso that a person could lawfully suffer forfeiture of his property if convicted of some offences e.g. under the Penal Code, Exchange control regulations, Customs and Excise Act etc. This clearly shows that there were several laws under which

a person's property could be forfeited without the person getting any compensation provided it was in the interests of defence, public safety, public order or the national economy. To that extent, the law would not be said to be unconstitutional.

The Forfeiture Act authorised the Minister to deprive a person of his property if the Minister was satisfied that the person had acted in a manner prejudicial to the safety of the economy of the state or was subversive to the authority of the lawfully established Government. Can one say that this part of the Act was unconstitutional? I do not think so. The circumstances under which one could be forfeited were spelt out and these were compatible with the proviso to Section 2 (1) of the Constitution.

It is significant to note that under the Act the Minister had powers to appoint a Forfeiture committee and to make regulations necessary or convenient for carrying out or giving effect to the Act. It seems, from the available evidence, there were no Forfeiture Committee and regulations. Perhaps if these had been created, the forfeited person could have had an opportunity of challenging the order at some point, or at least given an opportunity to be heard.

The evidence before me does not show the circumstances under which the plaintiff was forfeited. The assumption is that he had been acting in a manner as specified in the Act. However I feel that even today the Government should be able to justify its actions, otherwise how does one justify the action the Minister took.

It was held in MSCA Criminal Application No. 9 of 1992 **Chihana -v- Republic** that the United Nations Universal Declaration of Human Rights is part of the law of this country. Article 17 - (1) and (2) of the said declaration provides that every person has a right to own property and that no one shall be arbitrarily deprived of his property. And Article 8 guarantees every individual the right to an effective remedy by a competent national tribunal for acts violating fundamental rights.

The problem as I see with the Forfeiture Act from the available evidence of the present case, is the procedure used in declaring the plaintiff to be subject to forfeiture. The procedure offended the provisions of the constitution which guaranteed one the personal liberties enshrined in the United Nations Universal Declaration of Human Rights. The forfeited person was deprived of his property without fair compensation and his right to effective remedy by a competent court. The plaintiff was not even given any opportunity to be heard at any stage in the process of making him a subject to a forfeiture order or thereafter. The many cases that have come to this court show that almost all the people who were made subjects of the forfeiture order, the procedure used was similar to the one used in the present case. The Minister felt that he was not under any



obligation to state the circumstances that justified the making of the forfeiture order. The person forfeited was not given a chance to be heard. Perhaps if the proper procedure as provided in the United Nations Universal Declaration of Human Rights had been followed, the effect of the forfeiture order could have been otherwise. It is not surprising that the Forfeiture Act failed to survive in the new democracy. Having regard to all this I find that the Forfeiture Order in the present case was unlawful and unconstitutional.

As to whether this matter is statute barred or not I agree with what Judge Tambala said in Civil Cause No. 1855 of 1993 **Ali Mahomed Waka -v- The Attorney General**. The facts of the case were similar to those of the present case. The Judge said that Section 4 of the Limitation Act which prescribes time limits in cases founded on contract, tort, actions brought to enforce a recognisance or an award did not cover that type of case. He also observed that the forfeited person was barred from instituting any legal proceedings in respect of the forfeited property. He therefore found that the plaintiff was under a legal disability up to the time that the Act was repealed which was in 1994.

The plaintiff instituted these proceedings before the present Constitution came into force. He is therefore not bound by Section 138 of the Constitution. For the reasons I have given the plaintiff succeeds in all his claims. I therefore enter judgement for the plaintiff with costs. I refer the matter to the Registrar for assessment of damages in the event that the property can not be restored to the plaintiff.

DATED this 22nd day of January, 1997 at Blantyre.

  
Mrs A.S.E. Msosa  
JUDGE

