

MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 213 OF 2004

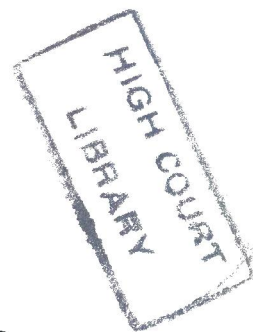
BETWEEN:

D. GUMBI t/a PREMIER DISTRIBUTORS PLAINTIFF

and

MALAWI REVENUE AUTHORITY DEFENDANT

CORAM: THE HON. MR. JUSTICE KAPANDA
Khondiwa of Counsel for the Plaintiff
Chankakala of Counsel for the Defendant
S.P. Moyo, Court Clerk



Date of Hearing: 16th September 2004

Date of Ruling: 18th November 2004

EDITORIAL NOTE

The plaintiff allegedly exported goods to Tanzania. At the time of export the defendant required the Plaintiff to furnish security for the duty payable on the goods. The Plaintiff now wants a refund of the duty that he paid as security. In point of fact, the plaintiff wants the court to determine whether or not, after paying the said security, he is entitled to a refund after he allegedly exported the said goods to Tanzania. In deciding this question the court will be required to interpret and apply the provisions of Regulations 70 and 72 of the Customs and Excise Regulations made under the Customs and Excise Act and some other relevant provisions of the Act.

RULING

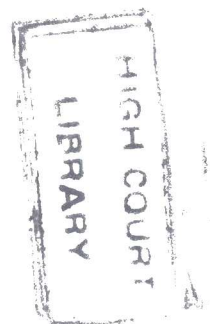
Kapanda, J:

INTRODUCTION

The plaintiff is a businessman operating under the style and name of PREMIER DISTRIBUTORS. He imports and sells alcoholic beverages and cigarettes. From the record he sells these goods both locally and sometimes exports to outside Malawi. Thus, in this business he deals with the Defendant.

The Defendant is an agency of the Government of Malawi whose function is, *inter alia*, to assess and collect revenue on behalf of the said Government of the Republic of Malawi. Further, in performing the above stated functions, the Defendant administers and enforces revenue laws relating to the importation and exportation of goods into or outside Malawi. One such revenue law is the Customs and Excise Act (Cap 42:01) of the Laws of Malawi and regulations made under the said Customs and Excise Act (the Act).

In this matter a dispute has arisen between the Plaintiff and the Defendant regarding the enforcement and application of the abovementioned revenue law by the Defendant. The Plaintiff is, therefore, seeking a number of declarations and remedies that have a bearing on the said Customs and Excise Act on the Regulations made thereunder. The declarations and remedies being sought are set out in the Originating Summons that he caused to be issued on 4th February 2003.



THE ORIGINATING SUMMONS

In the said originating Summons the Plaintiff wants the Court to determine a number of points of Law which he says have arisen under the Customs and Excise Act, and seeks the following orders/declarations viz:-

- (a) What procedure is the correct one to be followed in exporting goods that were under bond in a warehouse.

- (b) Whether the Customs & Excise Act provides for a requirement of escort by the defendant's officer on all goods to be exported from a warehouse to the port of exit.
- (c) What form, under the Customs & Excise Act, is required to be produced by the owner of goods that have been exported from a warehouse as being a Bill of Export.
- (d) Whether strict use of such form has been departed from through practice
- (e) Whether there are any alternatives to such form that can be used as a Bill of Export by an owner of goods that have been exported
- (f) Whether there are alternatives to the requirements in regulation 77 of the Customs and Excise Act Regulations as to proof of export for goods that have been exported from a warehouse.
- (g) Whether the defendants can resile from their representations made in their letter of 6th September 2002, which was to the effect that a refund of duty paid on the goods that the plaintiffs were to export

would only be made on production of duly stamped documents as evidence of such exportation.

- (h) What requirements does a claimant for a refund of duty paid by way of security on goods that have been exported has to meet before he can be given such refund.
- (i) Whether there are alternatives to such requirements to be met by a claimant before he can be given a refund of duty for goods that have been exported.
- (j) Whether the defendant can validly deny a claim by the plaintiff for a refund of duty paid by way of security on goods that have been exported due to the absence of an escort by the defendant's officers of the goods in question from a warehouse to the port of exit.

AMENDED RELIEFS

- (k) A declaration that the defendant is estopped from denying that the plaintiff has validly proved export of the goods forming the basis of the plaintiff's claim in

line with the representation made in their letter of 6th September 2002.

- (l) A declaration that the plaintiff has duly proved exportation of the goods forming the basis of this matter in line with the stipulations made in the defendant's said letter of 6th September 2002.
- (m) A declaration that through practice exporters of goods that were under bond in a warehouse use the same Bill of Entry i.e., form 12 as Bill of Export
- (n) A declaration that the production by the plaintiff to the defendant of duly stamped Release Orders Numbers R25707, R25665, R25662, R25668, R25732 and R25664 with copies of duly stamped form 12 attached thereto amounted to substantial proof of exportation of the goods forming the basis of this matter.
- (o) A declaration that the absence of an escort by the defendant's officers on the goods exported by the plaintiff from the warehouse to the port of exit (Songwe) cannot form the basis of denying the

plaintiff's claim for a refund of duty paid by way of security.

- (p) A declaration that the plaintiff is entitled to be given a refund of a sum of K1,896,449.55 paid to the defendant by way of security on the 1330 cases of whisky exported to Tanzania.
- (q) A declaration that the plaintiff is entitled to interest thereon at 3% above base bank lending rate reckoned from the time payment of the said sum fell due until payment.
- (r) An order for costs.

NARRATIVE OF THE FACTS OF THE CASE

I must mention at the outset that the defendant's affidavit was thrown out for failure to comply with the rules of the court. Accordingly, all that the court has, as facts of the case, is what is obtaining in the affidavit of Mr Duncan Gumbi. The following is a summary of the facts of the case as obtaining from the said affidavit: -

Importation of best whisky by the Plaintiff

Between May 2001 and September 2001 the plaintiff imported into the country, *inter alia*, a consignment of whisky. No duty was paid on the said importation. Accordingly, the said whiskies were cleared into a bonded warehouse belonging to Kuehne and Nagel Limited. The plaintiff did not manage to clear all the goods from the said Bonded Warehouse within the time stipulated under the Customs and Excise Act. The defendant rejected a request for extension of time within which the said consignment of whisky could be in the Bonded Warehouse. The Defendant then proceeded to detain the goods. A letter from the Defendant dated 13th August 2002 ably captures what the Plaintiff was advised regarding the said overstayed goods. For lack of brevity I will reproduce the contents of the letter of 13th August 2002. The said letter informed the Plaintiff as follows: -

*13th August 2002

Premier Distributions

P O Box 1912

BLANTYRE

Dear Sir,

OFFENCES AGAINST CUSTOMS LAW

With reference to the Detention Notice number 012251 of 12th July, 2002 that was issued on 2350 cartons of whisky sachets and 20 cartons of Marlboro cigarettes, after your request to have extension of period for those goods to be in the bonded ware house has been rejected, you are reminded that the goods have overstayed.

Be therefore advised that duty amounting MK5,743,730.10 must be paid to Malawi Revenue Authority before exporting your goods to Tanzania and then claim for a refund after exportation of the said goods.

This duty has been calculated on 2350 cartons whisky sachets, 20 cartons Marlboro cigarettes and 29 cartons of Marlboro cigarettes that are said to have been stolen from Kuenhe & Nagel bonded ware house.

Yours faithfully

(Signed)

T.B.C.D. Kayange

TAX AUDIT AND INVESTIGATION

For/ACTING COMMISSIONER GENERAL*

The Plaintiff never fulfilled the conditions set out in the above quoted letter.

SEIZURE OF THE GOODS

On 22nd August 2002 the Defendant then proceeded to seize the goods from Kuehne and Nagel Ltd warehouse on the ground that they had overstayed in the Bonded Warehouse. Seizure Notices were duly issued on the said 22nd day of August 2002. It would appear that the Plaintiff was advised of the seizure by his agents Kuehne and Nagel Limited. The goods seized and their Seizure Notices are as follows:-

<u>Description</u>	<u>Quantity</u>	<u>Seizure Notice No</u>
Best whisky	1050 cartons	0186741
Marlboro Cigarettes	20 cartons	0186740

The above information, concerning the seized goods, is the one that this court was able to gather from the affidavit filed by the Plaintiff.

The seized goods were eventually taken to the Defendant's warehouse in Blantyre. There was then a proposal, made by the Plaintiff to the Defendant, that the goods be cleared for export. The Defendant was agreeable to the proposal on condition that duty amounting to MK5,743,730.10 be paid as security before exportation. The security of duty was to be refunded to Plaintiff upon proof of the exportation of the goods. It is clear that the said security in the amount of MK5,743,730.10 was not paid but instead what followed was a claim by

the Plaintiff for the refund of duty that had been paid when a consignment of 1330 cartons was allegedly exported to Tanzania. The Plaintiff claimed a refund in the sum of MK1,896,449.55 being duty that had allegedly been paid on exportation of 1320 cases of whisky.

Refusal of claim for refund: The reasons

The Defendant rejected the claim for refund of duty that had allegedly been paid on exportation of the said 1330 cartons of whisky. Indeed, the Defendant demanded from the Plaintiff proof of exportation of the said whisky to Tanzania. The Plaintiff forwarded to the Defendant six Bills of Entry for export that purported to show that the said consignment of 1330 cartons of whisky had been exported to Tanzania. The Defendant still refused to make a refund to the Plaintiff. In its letter of 16th May 2003 the Defendant advised the Plaintiff as follows:

"16th MAY 2003

THE MANAGING DIRECTOR

PREMIER DISTRIBUTORS

BOX 1912

BLANTYRE

Dear Sir,

REFUND OF DUTY ON EXPORT FROM BOND

I would like to inform you that the refund of duty of MK1, 896,449.55 that you applied on 19th December 2002 for the exportation of 1330 cases of Best Whisky Sachets from bond would not be honoured.

The rejection of your application for the refund is on the basis that our investigations on your export of December, 2002 reveals that your claim for the refund falls short of requirements for duty to be refunded in the sense that:

- There was no escort from bond to the exit port. Songwe
- There is no record of your export either in the export registers or retained copies of export documentation at Songwe Customs Port

- There is no record of importation of whisky from Premier Distributors into Tanzania at Kasumulu in the year, 2002 in the imports registers as well as import documents.

However, take note that further discussions of your claim of the refund will only be open in the presence of a Tanzanian buyer whom your company said to be the person who actually exported the 1330 cases of Best whisky sachets since he may be in better position of explaining how the entire process of the export was carried out.

Yours faithfully

(signed)

N.E. MSAMALA

For: ACTING COMMISSIONER GENERAL

The Plaintiff was not happy with the refusal for a refund hence the commencement of these proceedings.

Having given a narrative of the facts I must now proceed to consider the issues for determination in this matter.

Consideration of Issues

As I see it, the originating summons herein principally raises two issues that must be determined by the court. The said questions are viz:-

- (a) whether or not the Plaintiff exported the consignment of whisky that had earlier on been seized by the Defendant
- (b) whether or not, if the said consignment had been exported, the Plaintiff is entitled to a refund of the duty was paid as security before exportation.

Further, the court must also determine the following ancillary issues

- (c) whether or not the plaintiff is entitled to interest on this claim for refund
- (d) whether or not the claimed costs are payable to the Plaintiff.

I will now, without much ado, move on to determine the issues that I have stated above.

Arguments of the parties

The Plaintiff has submitted that it exported the whisky the subject matter of this action. Indeed, it is the view of the Plaintiff that having submitted to the Defendant duly stamped customs documents evidencing exportation there is nothing more that they could do to prove exportation. Moreover, the plaintiff argues that the Defendant's demand that he shows further proof of exportation is unreasonable and unfair.

The MRA disputes that there was any real exportation of the whisky. The Defendant has argued that the Plaintiff has not discharged its burden of proving exportation of the goods.

As I understand it, whether or not the Plaintiff duly exported the whisky would require this court to explore the law governing exportation of goods. Further, this court must determine if the whisky was in fact exported. Indeed, the court must examine the evidence on record to see if the plaintiff demonstrated the fact of exportation.

Regarding the law and procedure on exportation of goods the starting point is to look at what the customs law states on the matter of exportation of goods.

Statutory frame work- exportation of goods and proof thereof.

For an understanding on what the law provides regarding exportation of goods one needs to set out the statutory framework in

respect of exportation of goods. The statute being referred to here is the Customs and Excise Act and the Customs and Excise Regulations¹.

Section 51 (1) of the said Customs and Excise Act provides, *inter alia*, that no goods shall be exported until they have been entered for exportation at the place prescribed for such purpose or at such a place as the Commissioner General of Malawi Revenue Authority (then called Controller of Customs and Excise) may direct. Further, the position at law is that goods are said to have been entered for exportation if there is a declaration made by the owner of the goods in accordance with the customs law². Moreover, a customs officer must accept the said declaration, and duty paid on such goods or security must be furnished for the due exportation of the goods.³ To signify acceptance of the declaration the customs office will sign on the customs declaration form prescribed for the purpose of exportation of goods. Further, an acceptable declaration showing that goods have been exported is one that shows that it was produced to a customs officer at port of exportation and certified by the officer that indeed the goods were exported⁴. Moreover, it is well to note that the Commissioner General has the power to require different or further evidence of due exportation of goods if he considers it necessary to do so.⁵ Additionally, the position at law is that the burden of proving

¹ Cap 42:01 of the Laws of Malawi

² Section 51 (2) (a) states that upon entering goods for exportation, the owner of such goods shall make a declaration in such manner and form as may be prescribed.

³ Section 2 as read with section 5 of the Customs and Excise Act

⁴ Regulation 72 of the Customs and Excise Regulations

⁵ *Ibid*

that goods were duly exported rests with the exporter of such goods.⁶ Furthermore, the Commissioner General has the mandate not to give a refund unless and until the claim is supported by evidence that he deems necessary before such refund is made.⁷

Now if there was security, in the form of payment of duty on the goods intended for export, no refund will be made to the exporter unless he proves to the satisfaction of the Commissioner General that there was compliance with the condition in respect of which such duty was paid. Indeed, there can be no refund of duty that was paid as security for due exportation of goods unless there is proof of exportation to the satisfaction of the Commissioner General.⁸

Did the Defendant export the consignment of whiskey the subject matter of this action?

In his quest to show that he had exported the whiskey, and therefore that he should be refunded the deposit of duty allegedly paid on the said exported whiskey, the Plaintiff submitted to the Commissioner General some documents. The said documentations were Assessment Notices, Release Orders and Customs Declaration Forms (Form 12). It would appear that the said Customs Declaration Forms were meant to be proof that the whiskey had been entered for exportation to Tanzania through Songwe. The Defendant rejected the claim for refund on the ground that

⁶ Ibid

⁷ Regulation 121 (1) of the Customs and Excise Regulations

⁸ Section 101(1)(b) of the customs and Excise Act is instructive in this regard and it states that no refund of any cash deposit as security shall be granted unless the applicant proves to the satisfaction of the Commissioner General that he has complied with all the provisions of the Act and of any addition which were imposed in respect of the security.

it was not adequate proof. Further, the Defendant demanded of the Plaintiff to bring up better evidence of exportation. In point of fact, the defendant said it would only reconsider the question of refund of duty if the Tanzanian buyer were called to explain how exportation was allegedly done. The Plaintiff thinks that the rejection of his claim of refund has no basis and in any event unreasonable. I do not agree with the Plaintiff in his contention that the claim for a refund of duty was wrongly, or unreasonably, rejected. Why do I say so?

Let me put it here that the documents that the Plaintiff attempted to use to get a refund appear to be the same ones that he wants to use in this action. This court would want to make the following observations regarding the documents in question:

Firstly, as I understand the position at law a Release Order and an Assessment Notice are not documents that prove exportation of goods. Indeed, these two documents are not Bills of Entry for Exportation of Goods. An Assessment Notice is meant to advise the owner of goods the duty and fees payable while a Release Order signifies that goods have been released on furnishing of security or payment of the duty and fees payable on the goods. Accordingly, the Assessment Notice and the Release Order are not, on their own, proof that the goods have been exported.

Secondly, I must state here that at the hearing of the Originating Summons herein the court demanded production of the original of the Photostat copies that were exhibited to the affidavit of the Plaintiff in respect of his application herein. The demand for production had been

made pursuant to the Rules of the Supreme Court.⁹ An examination of the requested documents, documents exhibited to the affidavit, and indeed those that had earlier on been presented to the Defendant's offices, show some disturbing features. These are: double stamping. Almost all the documents clearly show to the naked eye that there is a stamp that is a Photostat and yet another stamp affixed to the same document that is a fresh one. Further, the documents that the Plaintiff produced to the court at hearing are obviously Photostat copies. As if this is not bad enough the signatures on the documents that the Plaintiff produced are Photostats. Moreover, the Declaration Forms purportedly proving exportation have date stamps indicating they were affixed either on 8th or 9th August 2002. Yet there is evidence on record showing that the Defendant had seized the whisky on 22nd August 2002. In my judgment, the Declaration Forms supposedly showing exportation of whisky have nothing to do with the whisky that had been seized and was allegedly exported to Tanzania. How could a consignment that was seized on 22nd August 2002 be seen to have been entered for exportation on either the 8th or 9th of August 2002. Put in another way, how could goods that were seized on 22nd August 2002 be the subject matter of clearance on 8th or 9th August 2002 as shown on the said Forms 12 exhibited to the affidavit of the Plaintiff? This shows that the Customs Declaration Forms, attached as proof of export, are suspect. The Plaintiff story does not add up. It is well to note that as at 24th October 2002 the Plaintiff was still failing to clear the

⁹ Order 32/6/8 of the Rules of the Supreme Court [1999 Ed.] states, inter alia, the original exhibits to affidavits should be retained by the parties but be available for production at the hearing

goods and asking for time to clear them for export in November. How could he then export the same goods that were seized on 22nd August 2002 and his proof of exportation are Bills of Entry that are dated in August 2002. Further, it is strange to note that goods that were allegedly released to him for export on 4th October 2002 should be seen to have been exported on 8th December 2002. This, in my opinion, creates doubt that there was any bona fide exportation of the whisky.

Additionally, this court has observed that some documents that were supposed to have been issued by the Defendant's office in Blantyre at time of declaration that the goods were being entered for export have only one stamp for Kasumulu in Tanzania and no stamp that these documents were presented at the port of exit at Songwe. Furthermore, I have observed that some of the documents that were put in evidence as proof that goods had been exported do not even have the signatures of the customs officers who processed the said documents.

With the above observations in mind it cannot be said that the Plaintiff proved that the whisky was in point of fact exported. Moreover, this court finds that the defendant was not unreasonable when it demanded further evidence of exportation. Indeed, it cannot be said that the Defendant was wrong in demanding further and better documents showing that the goods had, as a matter of fact, been exported. Actually, the defendant's stance in demanding exportation documents or presence of the Tanzanian buyer so as to clear some issues with him was well

within the customs law.¹⁰ The presence of the Tanzanian buyer as owner¹¹ of the goods would have actually gone a long way in settling the issue of how he had exported the goods in view of the anomalies noted on the documentation purporting to prove exportation of the whiskey to Tanzania. As mentioned earlier, these anomalies include double stamping, lack of signature or Photostat signatures of customs officers, lack of customs stamp for the port of export and date stamps on Declaration Forms that appear to have nothing to do with export of the whiskey. Accordingly, this court is of the view that the defendant was right in rejecting the claim for refund. Moreover, I observe that there was no evidence in these proceedings to demonstrate that the plaintiff had complied with the customs laws at the time he purportedly paid duty as security for the exportation. The Plaintiff has not shown that he completed or filled the required form when making the payment of security of duty.¹² The argument that it was the practice to complete the so-called Form 12 is misplaced for practice is not a substitute for the clear provisions of the customs Rules or Laws.

In sum, just as the Defendant refused the claim for refund, this court also rejects the claim for refund. The rejection is premised on the fact that the Plaintiff has not proved to the satisfaction of this court as well that the whiskey was exported. Indeed, the evidence that the Plaintiff

¹⁰ Section 51(2)(b) provides that upon entering goods for exportation, the owner of such goods shall produce any relevant book or document and answer fully and truthfully any relevant question as may be required or put to him by an officer

¹¹ See section 2 of the Customs and Excise Act which defines the word owner of goods

¹² Regulation 124 stipulates that when any security for compliance with any of the provisions of the customs is given by cash deposit the person giving the security shall, when making the deposit, complete and submit to the proper officer an application Form 122

adduced to support the fact of exportation has raised more questions than answers regarding the question of exportation of the whiskey.

Interest and costs

The court has found, and concluded, that the claim for refund has not been made out. It follows, therefore, that his claims for interest on the refund must fail as well. As I understand it, the position at law is that a claim for interest must be pleaded not only in the particulars of relief but it must also be in the affidavit evidence. The same applies with regard to the basis and the rate at which such interest is claimed.¹³ The plaintiff's affidavit evidence was not in compliance with this law. With due respect, this court does not understand the basis upon which the plaintiff wanted this court to award him interest at the current-bank lending rate. Further, it is a settled proposition of law that an award of interest at a rate over and above the normal rate of interest awardable in a judgment is done when a court is exercising equitable jurisdiction.¹⁴ Moreover, the position at law is that unless a claimant is seeking for no more than simple interest at a normal rate he should also put before the court evidence on which the court can decide what amount (if any) to allow: *Profinance Trust SA vs. Gladstone* [2002]1 BCLC 141 at 152; <http://www.courtservice.gov.uk> (last visited on 7th November 2003). There was no such evidence offered to justify the award of interest at more than the normal interest rate payable on a judgment debt.

¹³ *Zomba Municipal Assembly vs. Council of the University of Malawi* C.C. No. 3567 of 2000

¹⁴ *Wallersteiner vs. Moir* (No.) [1975]1 All ER 849

As regards the question of costs, my judgement is that they are also not recoverable where the plaintiff has failed to prove his case. Further, and in any event, even if the Plaintiff had been successful in his claim it is very doubtful that he would have been awarded interest and/or costs.¹⁵ In terms of Section 154(2) of the Customs and Excise Act, the plaintiff is not entitled to any costs. The said Section 154(2) of the Customs and Excise Act provides as follows:

*"Where any proceedings are brought against the Controller (Commissioner General) under the Customs laws and judgment is given against the Controller (Commissioner General)¹⁶ then, that if the court before which such proceedings are heard is satisfied that there were reasonable grounds for the action giving rise to the institution of the proceedings, the plaintiff shall be entitled to recover anything seized, or the value thereof, but shall not be otherwise be entitled to any damages, and no costs shall be awarded to either party.
Provided that this section shall not apply to any action brought in accordance with Sections 20 and 174." (Emphasis supplied by me)*

It must be realized that the damages or costs being referred to in the above subsection are the ones that are only to be awarded where a matter falls under the provisions of sections 20 and Section 174 of the Customs and Excise Act. As discussed above, the occasions on which an award of such damages or costs would be made are limited. In the instant case there is no claim for damages for damage to premises or goods or property. Further, there is no claim for damages for negligence or wilful misconduct on the part of the officers and or agents of the Malawi Revenue Authority or the Commissioner General himself. Further, my

¹⁵ See sections 20 and 154 of the Customs and Excise Act; Dimon (MW) Ltd –vs- MRA Civil Cause No. 1641 of 2002 [High Court] [unreported decision of 8th October 2004]

¹⁶ see Section 28(a) of the Malawi Revenue Act (Act No. 9 of 1998) which states, inter alia, that all reference to the Controller of Customs and Excise in the Customs and Excise Act (Cap 42:01) shall be construed as reference to the commissioner General

reading of the abovementioned subsection suggests to me that such damages or costs will only be awarded if the matter comes within the provisions of Section 20 and Section 174 of the Customs and Excise Act. What then does Sections 20 and 174 of the said Customs and Excise Act stipulate?

Section 20 of the Customs and Excise Act states, *inter alia*, that damages will only be payable if there is physical damage to property, goods or person or premises resulting from the exercise of powers by a customs officer and/or an agent of the Commissioner General. The facts of this case, in my opinion, do not come anywhere near the stipulation of the said Section 20 of the Act. The complaint by the plaintiff is not about damage to its property or goods or premises. Furthermore, as I understand it, no damages and/or costs may be awarded where one obtains judgment against the Commissioner General. As already seen above, the question of damages or costs only comes in if a matter is within the provisions of Sections 20 and 174 of the Act. This court has already found that this matter is not one that comes within what is stipulated in the said Sections 20 and 174 of the said Customs and Excise Act. The defendant would only be liable to pay costs if there is an action against it where the claimant is successful in action in negligence or where the claim is that the defendant's officer and/or agents willfully misconducted themselves in the performance of their duties. Further, such costs would be awarded in a claim for damage to goods, property or person or premises.

CONCLUSION

The plaintiff's Originating Summons is dismissed. The Plaintiff's action was unreasonable. He must therefore be condemned to pay the costs of, and occasioned by, this Originating Summons.

Made in Chambers this 18th day November 2004 at the Principal Registry, Blantyre.


F.E. Kapanda
JUDGE

