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**IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE**

MSCA CIVIL APPEAL NO. 48 OF 2007
(Being High Court Civil Appeal No. 83 of 2005)

BETWEEN:

THE MALAWI REVENUE AUTHORITY APPELLANT

- AND -

AZAM TRANSWAYSRESPONDENTS

**BEFORE: THE HON. JUSTICE TAMBALA, SC, JA
THE HON. JUSTICE MTAMBO, SC, JA
THE HON. JUSTICE TEMBO, SC, JA**

Ngutwa, Assisted by Daka and Musimba (Miss)
Changwamnjira, of Counsel for the Respondent
Ethel Matunga Chisale, Typesetter
Selemani, Court Official

J U D G M E N T

MTAMBO, SC, JA

This appeal is against the decision of the High Court in which it held that the appellant acted in bad faith when it seized and detained the respondents' four trucks and trailers, and made an award of ZAR 1,892,967.84, being loss of income.

An account of the history of the case will certainly help to make matters and the conclusions we intend to reach on each issue easily comprehensible. The respondents are a firm in the business of transportation of goods across frontiers. On divers dates between the months of January and May 2004, they carried various goods into the country. The port of entry was Mwanza where, each time, authority was obtained to proceed with the goods to a temporary store at Malawi Freight Limited.

Some time in June 2005, the appellant seized the respondents' four trucks and trailers on the grounds that the appellant was of reasonable suspicion that the vehicles had been used in conveyance contrary to the provisions of customs laws. In or about September 2005, the respondents applied to the court of the Chief Resident Magistrate at Blantyre for an order declaring that the detention of their trucks and trailers was unlawful. They also sought an order directing the appellant to release the vehicles to them.

On October 24, 2005, the magistrate pronounced his judgment. He found the appellant guilty of wrongful detention of the vehicles and made an order that the vehicles be released to the respondents upon payment, he said: "*of any duty, fine or fee that he (sic) may lawfully be liable to pay under customs laws*", whereupon, the record shows, learned counsel for the appellant got on his feet and told the court that he had instructions to appeal against the judgment. He also sought leave to appeal and an order for stay of execution of the judgment pending appeal. Both leave to appeal and stay of the judgment were granted; the appellant continued to detain the vehicles. On March 13, 2006 the High Court upheld the decision of the magistrate whereupon the vehicles were immediately released to the respondents.

One year later, on March 13, 2007, the respondents, purportedly pursuant to the decision of the High Court, commenced further proceedings in the High Court for damages by way of a summons in this manner:

“SUMMONS FOR DAMAGES S. 153 CUSTOMS AND
EXCISE ACT CAP. 42:01

LET ALL PARTIES ATTEND the judge on the 26th day of March 2007 at 8:30 O'clock in the forenoon to hear an application on the part of the plaintiffs that damages be paid the conduct of the Commissioner General having been with malice and not in good faith.

*The affidavit of **MUNIR TARMOHOMMED** will be used in support hereof”.*

The summons was signed by the Registrar; the reference therein to the “Commissioner General” means the appellant. After hearing the parties the High Court found that the appellant acted in bad faith when it seized and detained the respondents’ vehicles and that the respondents “*thereby suffered damage and as a result loss of business, as the respondents were deprived use of their 4 trucks and trailers for a period of 9.41 months, at a net profit of R16,746.00 at 3 round trips per month*”. The High Court, therefore, made an award of ZAR 1,892,967.84 as loss of income.

The appellant was aggrieved by the decision of the High Court and so has appealed to this court on six grounds. Each ground of appeal was argued separately and we intend to consider each of them likewise.

We start with ground 1 which is that the High Court erred in law in ignoring the statutory defence available to the appellant in s. 154 (2) of the Customs and Excise Act (Cap. 42:01) of the Laws of Malawi. The section provides:

“Where any proceedings are brought against the Controller under the customs laws and judgment is given against the Controller then, 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 otherwise be entitled to any damages, and no costs shall be awarded to either party”:

“Provided that this subsection shall not apply to any action brought in accordance with sections 20 and 174”

Learned counsel for the appellant submitted that the intention of Parliament could only have been that only proceedings brought against the appellant in accordance with ss. 20 and 174 may entitle a plaintiff to damages, and that costs in such proceedings may be awarded to either party. Learned counsel for the respondents does not agree. He submitted that the immunity in s. 154 (2) is not “*wholesale*”. He said that the appellant loses the immunity where he does not act in good faith or does not act reasonably. He submitted that that is the only correct way to read ss. 153 and 154 (2) together. Section 153 reads:

“Except as otherwise specifically provided in the customs laws, no claim shall lie against the Government, the Department, the Controller, nor any officer for anything done in good faith under the powers conferred by the customs laws”.

This calls for the interpretation of these sections. The fundamental rule of statutory interpretation is that courts must endeavour to give effect to the express intention of them that made the statute under consideration. If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature – **In Come Tax Commissioners vs Pemsel** [1891] AC 534. And in **Duport Steels Limited -vs- Sirs and Others**, (1980) 1W.L.R 143 at 168, the court said:

“In the interpretation of statutes the courts must faithfully endeavour to give effect to the express intention of Parliament as gathered from the language used and the apparent policy of the enactment under consideration”.

We will bear this in mind as we endeavour to interpret the enactments under consideration. We will remember that a statute is the will of those that made it. We will remember that the fundamental rule of interpretation is to give effect to the express intention of those that made the statute.

It appears to us that of concern in s. 153 are the words *“anything done in good faith”*. It is plain to us that if the appellant does anything in good faith, no claim may lie against it, except, of course, as may otherwise be provided in customs laws. Conversely, it seems to us that a claim may lie against the appellant if it appears that something it has done may not have been done in good faith. The words of concern in s. 154 (2) are: *“if the court is satisfied that there were reasonable grounds for the action giving rise to the institution of the proceedings”*. So, if the court is satisfied that there were reasonable grounds for the action of the appellant giving rise to the institution of a proceeding, the person who will have instituted the proceeding may only recover that which the appellant will have seized or the value thereof, but no damages or costs may be recovered. Equally, if the court is not satisfied that there were reasonable grounds for the action by the appellant giving rise to the institution of a proceeding the immunity of the appellant as to damages vanishes. One consideration upon which the court may not be satisfied that there were reasonable grounds for the action giving rise to the institution of proceedings against the appellant would be whether the action complained of was done in good faith. If it appears that the action by the appellant will not have been done in good faith, it becomes unlikely that the court may be satisfied that there were reasonable grounds for the action complained of in which case the person who will have

instituted the proceeding would be entitled to damages and costs.

It seems to us, therefore, that the appellant would be liable in damages and costs if its action giving rise to the institution of a proceeding will not have been done in good faith or where the court will not be satisfied that there were reasonable grounds for such action, and indeed in respect of cases brought in accordance with ss 20 and 174 of the Customs and Excise Act.

Having said that, we should now consider whether the appellant is liable in damages or costs in the present appeal. The facts show that the appellant seized the respondents' vehicles on suspicion that they had each been used for the conveyance of goods contrary to the provisions of customs laws; there does not appear to be any controversy about this. The respondents, however, add thus:

“..... the appellants despite a court order from the magistrate court withheld 4 trucks and trailers wrongfully and in bad faith for 9.42 months thereby depriving the respondents loss (sic) of use of these vehicles. When their appeal was dismissed they released the trucks. The bad faith arises from their disobedience of a court order to release the trucks. But even in the absence of a court order holding on 4 trucks and trailers on an offence for K9 million which is the value of one trailer was in bad faith and unreasonable which entitled the respondents to damages.”

We would do well at this stage to refer to some provisions of the Customs and Excise Act. Under s. 35, the importer of goods and the owner of the importing conveyance are equally responsible for compliance with the customs laws. Under s. 145 (2) any conveyance which may be used without lawful authority for the importation or conveyance of goods liable to forfeiture, shall be liable to forfeiture. In sub -s (1) any goods

in respect of which an offence may have been committed under customs laws shall be liable to forfeiture. And under s. 146 the appellant may seize any conveyance which it reasonably suspects may be liable to forfeiture.

We have said that there is no dispute that seizure of the vehicles was upon suspicion that they had each been used contrary to customs laws. The appellant, therefore, cannot be faulted for the seizures because the law authorizes it to do what it did. The respondents, however, seem to argue that the action of the appellant could not have been done in good faith because the appellant disobeyed the court order to release the vehicles. Well, this argument is not correct. The evidence shows that the court allowed the appellant to detain the vehicles pending the determination of the appeal against its own decision. The evidence further shows that the appellant released the trucks immediately upon losing the case on appeal. The question of the appellant's action not having been in good faith would not, therefore, arise in these circumstances, both the seizure and the detention of vehicles having been in accordance with the law.

The respondents went further and said that in any case the detention of four trucks and trailers in respect of an offence involving only K9 million which, according to them, is the value of one trailer was in bad faith and unreasonable thereby entitling the respondents to damages. We think that this argument is missing the point for it sounds as if the reason for the seizures was to ensure certain payments. That was not so. The reason for the seizure of each vehicle was that each was suspected to have been used contrary to customs laws. We are unable to attribute fault to the appellant for that action because it would be wrong to do so; the appellant's action was according to law. There being no evidence that the appellant's action was not done in good faith or that there were no reasonable grounds for it, the immunity in s. 154 (2) of the Customs and Excise Act was available to the appellant and, therefore, that the High Court erred in law in ignoring that section.

immunity available

We now turn to the second ground of appeal which is that the High Court erred in law and on the rule in **Henderson -vs- Henderson** (1843) 3 Hare 100 in ignoring the plea by the appellant that the proceedings were caught by the defences of abuse of the court process and of **Res Judicata**. The respondents do not contest the broad principle of **Res Judicata**, namely, that there should be an end to litigation and that justice demands that the same party shall not be harassed twice for the same cause. The respondents, however, contend that the matter that was before both the subordinate court and the High Court on appeal was only about the release of the vehicles. They argue that the two courts did not have the opportunity to deal with the issue of damages which, they say, is a new matter following the finding that the appellant's action was not done in good faith.

We have said above to the effect that the appellant's action was done in good faith and that there were reasonable grounds for it. We, therefore, would only restrict our consideration in respect of this ground of appeal to whether the pleas of abuse of the court process and **Res Judicata** are available to the appellant.

We remind ourselves that, broadly speaking, the plea of **Res Judicata** is about two types of estoppels, namely, cause of action estoppel and issue estoppel. Cause of action estoppel is confined to cases where the cause of action and the parties in a proceeding are the same as before. Issue estoppel, on the other hand, arises in two instances: (a) where issues, whether factual or legal, have already been determined in previous proceedings between the parties – this is sometimes described as “**issue estoppel in the strict sense**”; or (b) where the issues, whether factual or legal, should have been litigated in previous proceedings but were not brought before the court – this is what is referred to as the “**Henderson rule**”.

The circumstances in which abuse of process can arise are very varied. Reference need not be made to all of them,

but, as Lord Somervell put it in Greenhalgh -vs- Mallard [1947] 2 All ER 255 at 257, may cover: *“issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.”*

In Brisbane City Council -vs- A-G for Queensland [1978] 3 All ER 30 at 36; [1978] AC 411 at 425, the Privy Council endorsed Lord Somervell’s reference to abuse of process thus:

“This is a true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation”

A series of cases in recent years suggests the need for an additional element, namely, the culpability of claimants in not raising relevant issues in previous proceedings. For example, where the claimant in the first proceedings not merely does not rely on the grounds then already available to him, but deliberately conceals the real facts, on which he later relies, in order to put forward a bogus case he should not be allowed to bring a second action for he would be guilty of abuse of process. On the other hand, there can be no doubt, that there may be situations where a decision not to raise an issue or join another defendant in previous proceedings may be justified so that a claimant should not necessarily be regarded as abusing the process of the court if he has to bring his second action. For example, a claimant might be faced with a choice between bringing one action or two where taking the former course would save great deal of time and costs for all concerned but could lead to duplication if he lost and had to bring his second action. A claimant who chooses the potentially more economical course in such circumstances should perhaps not necessarily be regarded as abusing the process of the court if he has to bring his second action. We

observe here that what the respondents did was in fact to the contrary. By bringing the second action in the High Court they chose a course that was potentially less economical, so to speak, than if they made the claim in the magistrate court. This seems to point to culpability on the part of the respondents.

Be the foregoing as it may, each case will be decided upon its own facts. Mere re-litigation where factual or legal issues have not already been determined in previous proceedings, does not necessarily amount to an abuse of process. Equally, bringing a second claim which could have been part of an earlier one should not *per se* be regarded as an abuse of process.

We say it again that each case would depend upon its own facts. The respondents in the present appeal began proceedings in the Chief Resident Magistrate Court for the release of their vehicles contending that the vehicles were wrongfully detained by the appellant. The respondents succeeded, both in the magistrate court and later in the High Court on appeal, and the vehicles were released to them. A year later, they brought further proceedings, in the High Court, against the appellant claiming damages on the basis, again, that the vehicles had been wrongfully detained. Both proceedings were instituted under the customs laws. Under s. 152 of the Customs and Excise Act the claim for damages could also have been made in the Chief Resident Magistrate court as a proceeding "*under the customs laws relating to any claim to any goods which have been seized under the customs law*". Clearly, the issue of damages, which was for the same reason as the issue in respect of the claim for the release of the vehicles, appears to us to have been so clearly part of the subject matter of the litigation in that court, that it becomes, in our view, both **res judicata** and an abuse of process to raise it in subsequent proceedings; it is obviously a matter which could and, therefore, should have been litigated in the earlier proceedings. The second ground of appeal, therefore, succeeds.

J.M.

The third ground of appeal is that the High Court erred in law in omitting to properly address the procedural questions in issue, namely, (a) whether or not s. 153 can be used to originate a summons for damages and (b) whether or not a claim for damages herein ought to have been commenced by way of Writ of summons under the Rules of the Supreme court.

We have already reproduced the summons above. It was a summons under s. 153 of the Customs and Excise Act requiring the parties to attend before a judge for the hearing of an application on the part of the respondents *“that damages be paid the conduct of the Commissioner General having been with malice and not in good faith.”*

It is obvious, and learned counsel for the appellant indeed so submitted, that the summons presupposed that malice and bad faith had already been established. Learned counsel, for the respondents drew our attention, in this respect, to what the High Court said as follows:

“The conveyances were detained or seized sometime around June 2005 and despite the proceedings in the lower court and the subsequent ruling of the said court, the appellant has neither restored the said conveyances back to the respondent accordance to section 147 (3) of the Act nor has the appellant instituted any proceedings against the respondent”

What the respondents are saying is that the continued detention, notwithstanding the order the court made, was evidence of malice and bad faith on the part of the appellant, hence the claim for damages. Well, we have said above that the appellant did not continue the detention of the vehicles on its own but that it was allowed by the said court to do so. The question of malice or bad faith on that basis does not, therefore, arise and, consequentially, the claim for damages falls away. Specifically whether s. 153 can be used to

originate a summons for damages we say that it cannot for it appears to us that this is a matter which ought to have been begun, if at all, according to Order 5 of the Rules of the Supreme Court. And in fact the High Court appears to have been of the view that the matter was begun by originating summons when that was not the case at all. This also answers the question whether the claim ought to have been begun by way of Writ of Summons.

We now refer to the fourth ground of appeal. It is that the High Court erred in law in holding contrary to the weight of evidence on record that the continued seizure of the respondents' trucks by the appellant was malicious and in bad faith. We believe that the position has already been made clear in respect of this ground of appeal. The question of malice or bad faith does not arise in the circumstances obtaining in this appeal.

The next ground of appeal is that the High Court erred in law in awarding the respondent a quantum of specific damages when the same had not been specifically proved by the respondents. In view of what we have said above this ground of appeal is now irrelevant. Suffice to say that by inserting specific figures the respondents were indeed claiming special damages as opposed to damages generally. It is trite, and the courts have said it before, that special damages must not only be expressly pleaded but must also be proved strictly. The meaning of this is that if a lesser amount than that claimed is proved by the evidence before it, the court will give judgment for the amount proved, but will not do so for more than the amount specified without appropriate amendment. With regard to the present appeal it seems to us that it would have been hard, on the evidence, to say that the amount claimed was proved.

The last ground of appeal is that the quantum of damages, if the High Court be said to have been correct in awarding the same, was unreasonable and clearly wrong. Not having found that the High Court was correct in making the

award, we think that this ground of appeal too is now irrelevant. We will not consider it.

All in all the appeal succeeds with costs.

DELIVERED in open Court this 22nd day of February 2008 at Blantyre.

Signed: 

D.G. TAMBALA, SC, JA

Signed: 

I.J. MTAMBO, SC, JA

Signed: 

A.K. TEMBO, SC, JA