

PRINCIPAL REGISTRYCIVIL CAUSE NO.264 OF 1985BETWEEN:R.J. MAKONZA,..... PLAINTIFF

- and -

MALAWI RAILWAYS LTD.....DEFENDANTCoram: MBALAME, J.

Fachi of counsel for the plaintiff
 Mbendera of counsel for the defendant
 Longwe, Gausi (Mrs.), Manda, Court Reporters
 Chigaru, Official Interpreter

JUDGMENT

By writ of summons specially endorsed the plaintiff claims from the defendant damages for breach of contract. It is the plaintiff's case that by an agreement reduced to writing, dated 22nd January, 1985 the defendant agreed to lease to the plaintiff 0.122 hectares of land at Mpingwe Estate at K10.00 per month payable quarterly in advance. The agreement was supposed to be for a period of three years commencing on 1st February, 1985 and determinable on 31st January, 1988. The plaintiff contends that the defendant was well aware and knew that he was requiring the plot for the purpose of operating a maize mill for profit. To honour his part of the contract the plaintiff paid to the defendant a sum of K30.00 being rental for the first quarter. He also obtained building plans for the maize mill for approval by the City of Blantyre and was given by the defendant, a site plan showing where he was to erect the maize mill building. By its letter of 2nd February 1985 the defendant unilaterally repudiated the said agreement and this has caused loss on the part of the plaintiff, it is alleged. He therefore claims a sum of K80.00 per day being the profit he would have netted from 1st March, 1985 to 31st January, 1988. He further claims a sum of K60.00, the cost of the building plans.

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The defendant, by its amended defence, while admitting that there was such an agreement and that it in/terminated the agreement on the other hand states that as no suitable building or any building at all had yet been erected on the premises in question, the plaintiff could not commence his business operations. It is further contended that it was

a condition precedent that the approval of the defendant be sought before the erection of the building and that this was not done. That being the case, it is argued, the plaintiff was not ready or able to operate the maize mill business and cannot therefore be said to have suffered loss. It is then argued that if the plaintiff suffered any damage at all, then the damage can only be limited to a period of three months since under the agreement either party could terminate the lease on giving the other three months' notice. In the alternative, it is argued that the plaintiff failed to take reasonable steps to mitigate the loss and damage, if any, in that he refused to accept alternative premises.

In his evidence in chief, the plaintiff more or less reiterated his allegations in the pleadings. He said he agreed to rent the defendants' plot at Mpingwe on 15th November 1984 and was thereafter given some two personnel by the defendant to go and identify one. He chose one which was close to an electricity supply source and in a densely populated area. Thereafter a formal contract for a three year lease was signed between him and the defendant, on 22nd January 1985, exhibit P2. It was his evidence that the defendants were well aware that the purpose of procuring the plot was to plant a maize mill for business. He said he then had building plans made but was surprised when the City Engineer told him that the plot had already been allocated to some other person. He said the defendants then offered him an alternative place in Area 1 but he declined it because it was not serviced with electricity. Seeing there was little the defendants could do, he referred the matter to his lawyers. He then tried to get alternative plots from other sources like the Malawi Housing Corporation and the City of Blantyre. He was able to procure one with the latter but could not plant the maize mill because, again, there was no electricity at Namiango. Having failed to find an appropriate plot on which to put the electric maize mill he had to change to a diesel propelled one and finally installed it at Balaka in Machinga District where he said the profits he is realising are much lower than what he would have had within the City of Blantyre. In cross examination, he conceded that it would have taken him time to have the building plans approved by the City of Blantyre, build the house, have electricity connected and actually begin to trade. He conceded that from the day the defendants are said to have breached the contract it would have taken him more than three months for him to complete the above exercise.

PW2 was Mercy Kananji who works as secretary/cashier for H. Mahomed Chinakanaka at Luchenza. She was called as a witness to show how much profit Chinakanaka maize mills make at Kenjedza. With respect I did not find this witness's evidence very useful. To start with, Kanjedza Township is different from Mpingwe. I will, in my judgment, however consider it for what it is worth. PW3 was Mrs. Sopia Kalimba, a Town Planning Officer with the City of Blantyre who confirmed that the plaintiff's application in respect of the plot in Bangwe could not be processed on instructions from the defendant. This concluded the case for the plaintiff.

The first witness for the defence was Geoffrey Elton Machinjiri who said he was looking after his father's maize mills at Mpingwe, Bangwe, Soche and Chileka. It would appear that the one at Mpingwe is on the plot on which the plaintiff was to plant the maize mill now the subject of these proceedings. He said that the maize mill began its operations in the month of September, 1985. He went at length to describe the expenses he and his father incurred to install the maize mill up to the day they begun operations. He then told the court what the takings were during the months of October, November and December and what expenses there were by way of electricity bills and labour, leaving aside the question of goodwill of the business. I thought his evidence regarding the possible profit the plaintiff would have made if he had planted his maize mill there was more relevant to the case and I accept it.

DW2 was one Kemevor Namarwa, an office superintendent with the defendants. This witness said he was familiar with the lease in question and that it was supposed to have commenced in February, 1985 and that due to some circumstances the defendants wrote the plaintiff advising him of an alternative plot as opposed to one at Mpingwe. There was no response. He conceded in cross examination that the defendants did not give the plaintiff the required three months' notice to terminate the lease.

Both counsel addressed me in this case. Mr. Mbendera who appears for the defendant submitted that the defendant does not deny repudiating the lease agreement on 2nd February, 1985. He said had the defendant given the plaintiff a notice of its intention to terminate the contract this case would not have arisen. He further contended that since at the time the defendant breached the contract the plaintiff had not yet presented his building plans to the City Engineer to build the maize mill house nor applied for electricity to be connected by ESCOM, the plaintiff cannot be said to have made any loss as a result of the breach. It was further his argument that the plaintiff, even if given three months' notice, could not have possibly obtained all the necessary approvals from the City of Blantyre and ESCOM to build and start operating the business to make the profit now being claimed. He has quoted several cases to the effect that the plaintiff prove his actual damages and that if he cannot then he must in the circumstances be awarded nominal damages.

Mr. Fachi has submitted that in the present case the defendant was well aware that the plaintiff wanted the plot for purposes of operating a mazie mill business for profit. The breach on the part of the defendant has resulted in a foreseeable loss of that profit by the plaintiff and the plaintiff should therefore be compensated. He has, among other things, referred to this Court the case of Victoria Laundry (Windsor) Ltd. v. Newman Industries (1949) 2 K.B. 528 at 539. He has further contended that the case before the Court is not that the plaintiff was not given profit but that there has been a breach of contract.

The defendant does not deny breaching the contract. It is however argued that although the contract has been breached, this has not occasioned any loss to the plaintiff. In my judgment, it is necessary at the on-set to decide over which period the defendant can competently claim for loss of anticipated profit. Mr. Fachi has submitted it should be the whole of the 3 years while Mr. Mbendera contends it should be the notice period. In my view the latter view is more acceptable. Following the former submission it would mean that the defendant was bound to the lease agreement for the total period of 3 years without any option of termination. It would indeed result in a quatiitious exepacia payment by the defendant to the plaintiff of money he neither worked for nor even begun to do so for. This would, in my judgment, defeat the object of an award of damages which is to give a plaintiff compensation for the damage, loss or injury he has suffered. What then is the measure of damages? As Lord Blackleurn said in the case of Livingstone v. Rawyards Coal Co. (1880) App. Cas. p.25, 39, the measure of damage is -

"that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation".

This statement has been quoted with approval in many cases including that of Banco de Portugal v. Waterlow (1932) A.C. 452, General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. (1975) 1. W.L.R. 819 and indeed restated in similar language by Asquith, L.J. in Victoria Laundry v. Newman.

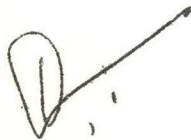
I have said earlier on in this judgment that the relevant period to be considered when assessing damages will in this case be the three months immediately following the breach of the lease agreement by the defendants, i.e. three months next following the 2nd of February, 1985. What is it which the plaintiff would have had by way of profits during the months of February, March and April, 1985 had the defendants not committed the breach? In what position was he on the 2nd of February, 1985 that this Court can restore him to by compensating him with money? A close look at the trend of events, would I be of some assistance? The lease agreement between the parties was reduced to writing on 22nd January 1985 in which agreement it was agreed that the lease was to commence on 1st February 1985. One day later, the 2nd of February, 1985 the defendant breached the contract. In other words, the lease agreement only lasted one day. The plaintiff even after the breach nevertheless tried to get approval from the City Engineer to build but sought no Court Order for specific performance of the lease agreement.

It is clear from the evidence above that the plaintiff would not have started operating his business before the month of May, 1985. DW1, Mr. Machinjili, explained how long it took for his maize mill to be planted on that very plot. It took him from February to end September, 1985 to start operating the mill. I, in the circumstances, find that the plaintiff would not have made any profit during the three months in question. In any case, I think he would have been

spending by way of capital investment and waiting for approvals from the City of Blantyre and eventually ESCOM. Since he could not have made any profit he therefore lost nothing and he cannot be compensated for what he has not lost, for doing so would not be putting him in the same position as he would have been were it not for the plaintiff's wrong.

Be this as it may, I have however held elsewhere that the defendant was in breach of the contract. This is a wrong on the part of the defendant which has no direct monetary value. The compensation to which the plaintiff is entitled to is, in my view, by way of nominal damages and is, in the circumstances, at the discretion of the Court. As I have observed earlier on the agreement only lasted one day and there is not much one would have hoped for. I award the plaintiff K300.00 damages on this head. I also allow his claim for K30.00 being his payment in advance for the first quarter. The plaintiff's case succeeds to this extent and this extent only, with costs on the full subordinate court's scale.

PRONOUNCED in open Court this 18th day of February, 1988, at Blantyre.

A handwritten signature in dark ink, consisting of a stylized 'R' followed by a diagonal stroke and a small dot.

R.P. Mbalame
JUDGE