



IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 133 of 2022

BETWEEN

DAHLA NOMHLE MHANGO t/a THEKWINI.....CLAIMANT

AND

MYBUCKS BANKING CORPORATION LIMITED.....DEFENDANT

Coram: **Manda, J**

Bhana for the Claimant

Mtokale for the Defendant

M. Kachimanga Court Clerk/Interpreter

RULING

This was the claimant's application for summary judgment in which the claimant claimed the amount of MK7, 000, 000 and any earnings thereon, an account of all profits the defendant made from the retention of the MK7, 000, 000, punitive or exemplary damages, compound interest on the damages and cost of the action. The defendant has opposed the application arguing that this is not a matter that can be determined summarily.

The facts of this case are essentially not in dispute. The claimant is a business woman who was carrying out a distributorship for Castle Limited products (erstwhile SOBO). The claimant also deals in TNM and Airtel products. The defendant is a commercial bank. The claimant and the defendant have a customer and banker relationship

In or around 2006 and 20th August, 2014, the claimant entered into agreements with Telkom Networks Malawi Ltd and Airtel Malawi Limited to be sales agent for the cell of phone units and provision of other services offered by the two companies. In February 2019, the defendant

for valuable consideration granted the claimant a facility for a guaranteed amount MK7, 000, 000, which facility was supposed to expire on the 31st of January, 2021.

It was the claimant's assertion that at the expiry of the facility with no claim being presented or discharged by the defendant, the defendant was duty bound to release the amount of MK7, 000, 000 back to her. It is the claimant's case that the defendant breached its duty and breached her right to property by neglecting, omitting and refusing to release the stated amount. It was a further assertion of the claimant that by its conduct, the defendant must be deemed to have derived profits from the wrongful detention of the guaranteed amount. The claimant also argued that she was deprived an opportunity to invest the guaranteed amount in her business and expand the same.

The defendant's opposition is that the application was not properly brought before the court because the applicant did not verify the facts and did not state that they believed that there is no defense as per Order 12 r 22. Secondly the defendant argued that there are contentious issues in this matter. First, being the fact that the claimant stated that the MK7, 000, 000 was not paid back when according to the defendant the same was paid back as per exhibit "WK7" which shows that they paid back MK7, 800, 000. It was the defendant's assertion that this is a factual issue which is in contention.

Secondly, it was the defendant's contention that the interest being claimed by the claimant was taken care of by the payment of MK7, 800, 000 and that the amount was deposited in a fixed deposit account which was earning a higher interest rate than a normal savings account. The defendant thus submitted that the claimant has not suffered any loss. Further, the defendant also argued that when it comes to returning of financial instruments under a guarantee, the same can only be understood from the business practice obtaining in the financial institutions and that this requires witnesses from the banks at a full trial. Further still it was the defendant's submission that as soon as they received the financial instrument, they released the funds to the claimant. The defendant finally noted that the claimant did not specify the orders and reliefs that she was looking for.

In reply, it was the claimant's submission that the defendant has not defence and that she did state this in her sworn statement. With regards the fact that the money was repaid to her, it was the claimant's contention that "WK7" is just a statement generated by the defendant that the claimant is not aware of the same and that no communication was made to her that the money was returned to her and thus no evidence to that effect. In terms of interest, the claimant stated

that it is not clear whether the interest covers the one year that the defendant held on to the funds or the period of the guarantee. Secondly, it was the claimant's argument that had this money been returned to her immediately after the expiry of the guarantee she would have reinvested the money and made more money as compared to putting the money in a fixed deposit account. It was thus the claimant's assertion that she was not fully compensated. The claimant also reiterated that she is claiming punitive damages.

Clearly from the defendant's opposition and from the claimant's reply there is a serious dispute of fact, namely whether the MK7, 000, 000 was paid back to the claimant or not. This being the principal claim, it has a bearing on this case in terms of how interest is to be assessed and from what date. Then there is also a dispute as to the interest itself with the defendant claiming that she paid the claimant full interest and the claimant alleges that she was not fully compensated. Further, there is also the aspect of the loss that was occasioned to the claimant. The question being what loss would the claimant be entitled to claim? In this regard it should be noted that the claimant was claiming punitive damages which are only awarded for outrageous conduct and are rarely awarded in contract cases. The claimant would then have to demonstrate and justify as to why she should be awarded punitive damages by proving that the defendant deliberately committed a tort (see *Rookes v Barnard* [1964] AC 1129, *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 and *AB v South West Water Services Ltd* [1993] QB 507 (ICLR))

From the foregoing, it is my considered view that this matter cannot be determined summarily. The application for Summary Judgment is thus dismissed and order that the matter should be set down for Mediation or that there should be an application for exemption from Mediation so that the matter can proceed for trial.

I will make no order as to costs at this point. The costs will be in the cause

Made in Chambers this.....12.....day ofFebruary.....2024

THE HIGH COURT
(COMMERCIAL DIVISION)
LIBRARY
P/BAG 22, BLANTYRE

K.T. MANDA
JUDGE