**Republic of Malawi**

# IN THE HIGH COURT OF MALAWI
## COMMERCIAL DIVISION
## BLANTYRE REGISTRY
### COMMERCIAL CAUSE NUMBER 231 OF 2019
*(Before Msungama, J.)*

**BETWEEN:**
**DJ KINGSLEY TRADING COMPANY LIMITED ..... CLAIMANT**
**AND**
**FDH BANK LIMITED .....DEFENDANT**

**CORAM:**
M.T. Msungama, Judge
Maliwa, of Counsel, for the Claimant
Mbvundula, of Counsel, for the Defendant
Makondi, Court Clerk

**Ruling**

**The Application**

1. This is a ruling on an application by the Claimant to re-amend its Statement of Case. The application, which is opposed by the Defendant, is made under the auspices of O.7 r. 23(1) CPR 2017 and the inherent jurisdiction of the court. The re-amendment is being sought after the closure of the statement of case hence the requirement of the permission of the court.

2. The application is opposed by the Defendant. Both sides have filed sworn statements and skeletal arguments in support of their respective positions on the application.

**Background matters**

3. The Claimant in this matter brought an action against the Defendant, a commercial bank, claiming, *inter alia*, damages, an order reversing interest charges on a loan obtained from the Defendant, and a further order restraining the Defendant from instituting bankruptcy proceedings against the Claimant, interest on a sum of MK6,500 and costs of the action. The action was commenced on the 19th day of July, 2019.

4. By its statement of case, which has been amended once, the Claimant states that in 2010 it obtained a loan from the Defendant in the sum of MK1,500,000. The loan was to be used as additional capital for its soap manufacturing business. Property comprised in Title

Number Chilomoni 5/215 was pledged as security for the loan. It is further asserted that due to scarcity of foreign exchange at the time, the business had difficulties in importing raw materials for its manufacturing activities. This state of affairs necessitated a diversification to activities like tea processing and manufacturing of organic fertilizer. To successfully venture into these diversification activities, the Claimant applied for a further loan from the Defendant on the strength of the same security. However, the Defendant refused to entertain the Claimant's application and further refused to transfer the security to another financial institution that was willing to advance the financial facility to the Claimant. This resulted in the Claimant losing the profit it would have made on the diversified business ventures, it is alleged.

5. The Claimant's statement of case further asserts that on or about the 21st day of May 2014 the Claimant paid the sum of MK4,545,150.36 to the Defendant thereby fully discharging its loan obligations to the Defendant. However, although the Defendant proceeded to discharge the security for the loan, it continued to charge the Claimant interest and threatened the Claimant with insolvency proceedings. It is further alleged that the Defendant failed to oblige with the Claimant's instructions to invest the Claimant's sum of MK6,500 in a savings account thereby occasioning loss of interest on the said sum. In a nutshell, the Claimant believes that the Defendant breached its fiduciary duty and its duty of care towards it through its conduct thereby occasioning loss and damage to it. The particulars of the alleged breach are specified as follows:

    1) Misrepresenting to the Claimant the services the Defendant would provide to the Claimant when the Claimant opened an account with the Defendant.

    2) Failing to allow the Claimant to transfer the security to another bank

    3) Unreasonably refusing to process the Claimant's applications for the tea and fertiliser business ventures

    4) Unfairly controlling the security whilst earning interest but at the same time denying the Claimant to mitigate its losses in doing new business.

6. The Claimant claims that by reason of the matters aforesaid it suffered loss and damage particularised as follows:

    1) Loss of earning capacity
    2) Loss of interest on savings account
    3) Interest charges on discharged security

7. Further, the Claimant restricted its claimed reliefs to the following, thus:

    1) Damages

    2) Reversal of interest on the discharged security and restraining the Defendant from instituting any bankruptcy proceedings against the Claimant

    3) Payment of interest on the sum of K6,500 aforesaid; and

4) Costs of the action.

8. The Claimant's claims are denied by the Defendant. As required by the rules of practice, the matter has gone through all the pre-trial processes and has been ready for trial. The court appointed the 7th day of March 2023 as the trial date. On that day, when we gathered in court for the proceedings to start, Counsel Kumitengo, who has been representing the Claimant after taking over from M/s John M. Chirwa & Company, told the court that the Claimant was seeking an adjournment to another date because the Claimant had appointed an additional counsel to join him in representing the Claimant. This was counsel Maliwa. He was also present in court on the trial date. The request for adjournment was not opposed by counsel for the Defendant. As a result, the court adjourned the matter generally as opposed to a specific date. Then on the 25th day of July, 2023, the Defendant filed a without-notice application for permission to amend its statement of case. This application was lodged by counsel Maliwa. However, the court ordered that such an application had to come with notice to the other side. Thus, on the 1st day of August, 2023, the Claimant, through Counsel Maliwa, filed its with-notice application for permission to amend its statement of case. This is the application which we are dealing with now. The intended re-amendment is quite extensive. Just to put the matter in perspective, the draft re-amended statement of case is nine pages long as opposed to the current statement of the case which is only three pages long.

**The issue for determination by the court**

9. The task of the court in this application is to determine if this is an appropriate matter in which the Claimant should be permitted to re-amend its statement of case.

**Parties' positions and arguments**

10. The Claimant argues that in an application like the present, O.7 r.23(1) CPR 2017 enjoins the court to consider the question of prejudice to the other party, which prejudice cannot be remedied by an award of costs, or extension of time or adjourning the proceedings. It is further argued that bearing the overall objective of CPR 2017 which is to deal with matters justly, it follows that where there is no prejudice to the other party or where there is prejudice which can be remedied as provided, an amendment must be permitted. The Claimant argues that it is clear that its intended re-amendment is sought to facilitate a better presentation of the issues between the parties in that the Claimant intends to include other claims in the re-amended statement of case. In the Claimant's view, the re-amendment, if allowed, will not prejudice the Defendant since it can be given more time to file an amended defence to take into account the new claims.

11. In the sworn statement in opposition sworn by Counsel Mbvundula, she states that following mediation, the parties agreed and it was ordered by the court that the second and third claims should be struck out on condition that the Defendant would not pursue any claims against the Claimant with respect to the interest accrued on the residual sum of MK6,500. She asserts that a settlement order to this effect was duly filed with the court on 23rd October 2020. She continued to depone that when the matter proceeded to a scheduling conference, it was directed that the only issue for determination at the trial would be whether the Claimant was entitled to loss of earnings and business as a result of the Defendant not availing the Claimant continued financial assistance. It is asserted that in the intended re-amendment, the Claimant intends to reintroduce the issue relating to the residual sum of MK6,500 which was already disposed of at mediation. The reintroduction

of an issue that has already been disposed of at mediation will prejudice the Defendant in such a way that would not be remedied by extension of time or by costs, it is argued. It is Counsel Mbvundula's view that if the re-amendment is allowed, the Defendant will have to refile its defence and the matter will have to go through the stages of mediation and scheduling conference and preparation of fresh trial bundles thereby occasioning further costs to Defendant. The Defendant argues that the right of a litigant to amend statements of case must be balanced with the duty to ensure active case management and expedient use of the court's resources as enshrined in O.1 r. 5 of the CPR 2017.

**The law on amendment of statements of case**

12. The starting point is O.7 r.23(2) of the CPR 2017. The cited provision states as follows:

> "(1) A party may amend a statement of case to__
>
> (a) better identify the issues between the parties;
> (b) correct a mistake or defect; or
> (c) provide better facts about each issue.
>
> (2) After closure of the statement of case, an amendment may only be made with the permission of the Court or the consent of the parties.
>
> (3) In deciding whether to allow an amendment, the Court shall have regard to whether another party would be prejudiced in a way that cannot be remedied by__
> (a) awarding costs;
> (b) extending the time for anything to be done; or
> (c) adjourning the proceeding"

13. As can be seen from the reading of the above provision, an amendment can be effected by a party without the permission of the court or the consent of the other party if it is made before 'closure of the statement of case'. A statement of case is deemed closed at the expiration of 7 days after service of the reply or, where there is no reply but only a defence to a counterclaim, at the expiration of 7 days after the service of the defence to a counterclaim[1]. Further, where there is neither a reply nor a defence to a counterclaim, then the statement of case is deemed closed at the expiration of 7 days after service of the defence[2].

14. As regards the principles that are applied by the courts in opposed late applications for amendments of statements of case, the first point of call would appropriately be **Swain-Mason v Mills & Reeve LLP** [2011] EWCA Civ 14 in which the claimant applied to amend its statement of case to introduce what the judge termed as a '*completely new case*' on the first day of trial that had already been adjourned once. Reversing the trial judge's decision to allow the amendment, Lloyd LJ said at par. 72:

> "As the court said in **Worldwide Corporation Ltd v GPT Ltd** [1998] ... it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment



[1] O. 9 r. 1(a) CPR 2017
[2] O. 9 r. 1(b) CPR 2017

> than it used to be in former times and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of other parties to the litigation and that of other litigants in other cases before the court."

15. The Court of Appeal in the case of **Hague Plant Ltd v Hague** [2014] EWCA Civ 1609 upheld a challenge to a refusal to allow re-amendments of particulars of a claim on the ground that they were too late notwithstanding that no trial date had yet been fixed. In its judgment the court was of the view that lateness is not an absolute but a relative term and that it all depends upon a careful review of the nature of the proposed amendment, the [illegible] explanation for its timing, and a fair appreciation of its consequences in terms of work wasted and consequential work to be done. Lateness, therefore is of an almost infinitely variable weight when striking the balance in determining whether or not to permit amendments.

16. In these applications, it is important for a court to assess the intended amendment and determine if allowing it would expose the opposing party to further, duplicative, or otherwise unnecessary work and the knock-on consequences in terms of increasing the weight, cost and duration of the trial and of further case management ahead of it. The court, in these circumstances, is entitled to apply its general and particular experience to these questions without spelling out, in an analytical detail, the reasons for its conclusions about the increased cost and burden, both to the parties and the court, threatened by a substantial proposed re-amendment.

17. Further, it is also important that the court should at all times bear at the back of its mind all matters that are indicated in O. 5 r. 1 to deal with the case in accordance with the overriding objective of CPR 2017 which is couched as follows:

> "The overriding objective of these Rules is to deal with proceedings justly and this includes__
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> (a) ensuring that the parties are on an equal footing;
> (b) saving expenses;
> (c) dealing with a proceeding in ways which are proportionate to the__
>
> (i) amount of money involved;
> (ii) importance of the proceeding; and
> (iii) complexity of the issues;
>
> (d) ensuring that a proceeding is dealt with expeditiously and fairly; and
> (e) allocating to a proceeding an appropriate share of the Court's resources, while taking into account the need to allocate resources to other proceedings."

18. In the case of **Quah Su-ling v Goldman Sachs International** [2015] EWHC 759 (Comm) the claimant applied for permission to amend the particulars of the claim two weeks before the trial date. The lateness of the application led to the trial being postponed. Carr J had occasion to come up with the relevant principles to be taken into account by a court in considering whether or not to allow a late amendment. These can be summarised as follows:

    1) Whether or not to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of utmost importance. Applications always involve the court striking a balance between injustice to the

applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.

2) Where a very late application to amend is made, the correct approach is not that the amendment ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to pursue it. The risk to the trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

3) A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.

4) Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.

5) It is no longer sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In modern times it is more readily recognised that the payment of costs may not be adequate compensation.

6) It is incumbent upon a party seeking the indulgence of the court to be allowed to amend to provide a good explanation for the delay.

7) Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately and that the courts enable them to do so.

19. In **Rose and others v Creativityetc and others** [2019] EWHC 1043 (Ch) the court refused an application by the first and second claimants to re-amend the particulars of the claim. The proposed re-amendment was quite substantial. The Claimants sought a declaration that certain mortgages were rescinded as they were entered into as a result of fraud committed by those controlling the first defendant. The particulars of the claim which were intended to be re-amended were approximately thirteen pages long whereas the proposed re-amended particulars were extended to approximately forty-one pages. The re-amendment also raised noticeably different matters than were contained in the original and amended particulars of the claim. The effect of the re-amended particulars of the claim would have been to downgrade the redemption claim to being an alternative to the Claimant's new principal claim that the mortgage should be held to have been rescinded due to allegations of extensive fraud. There was, thus, a radical change in the nature of the claimant's case that was being proposed by the re-amendment. In exercising its discretion, the court provided a helpful summary of several factors to be considered including the timing of the application and the extent of the amendments, to decide whether the

application should be allowed. The court stated that it is important that the court should, at all times, have regard to the overriding objective of the rules namely that cases should be dealt with justly and at proportionate cost. Further, the court stated that courts are required to have a much greater appreciation of the effects of the amendments on the court and other litigators than previously was the case. In particular, an amendment bringing delay and or a change in approach may cause prejudice to another party that cannot be precisely quantified and, therefore, payment of costs may not be adequate.

20. The court further observed that in as far as the timing of the intended amendments is concerned, at the beginning of the proceedings, there is an interest in allowing the real dispute between the parties to be determined, and in allowing the parties to put forward their cases. In those early stages, the waste of the court's time, the prejudice to the other side and the adverse effect on other litigants are likely to be less than they later become. The later an amendment is proposed, the more those factors will normally carry greater weight. The court refused permission on the basis that the claimants were seeking an entirely different basis of claim consisting of serious allegations, which they deliberately chose not to assert when they commenced the proceedings. Further, the court found that the proposed re-amendment would have, at a later stage in the proceedings, taken the case back to square one. It is, in the light of the observations of the court in this decision, the gratuitous advice of this court to those who come to the Commercial Division of the High Court, that they should endeavour to put forward their best claim or defence at the outset as there is a risk that amendments will not be permitted, particularly where those amendments are requested a long way into the proceedings and/or significantly change the party's case. A party that delays in putting forward its best case at the outset may, by such conduct, be digging a grave into which its own case will be buried.

21. In the case of **CIP Properties (AIPT) v Galliford Try Infrastructure Limited** [2015] EWHC 1345(TCC) the claimant applied for permission for extensive amendments to its case. Such amendments would have necessitated the adjournment of the trial date which the judge was of the view should be maintained. In that case, the court also summarised the applicable principles as follows:

    1) The lateness by which an amendment is sought is a relative concept. An amendment is late if it could have been advanced earlier, or involves duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert reports) which have been completed by the time of the amendment.

    2) An amendment can be termed as very late if permission to amend threatens the trial date even if the application is made many months before the trial is due to start since parties have a legitimate expectation that trial dates will be met and not adjourned without good reasons.

    3) The prejudice to the opposing party including the disruption and additional pressure on its lawyers in the run-up to the trial, and the duplication of cost and effort.

4) Prejudice to the amending party if the amendment is not allowed will obviously include its inability to advance its amended case but that is just one of the factors to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise.

22. In the case of **Nesbit Law Group LLP v Acasta European Insurance Company Ltd** [2018] EWCA Civ 268 the court opined that in essence, the court must, taking into account the overriding objective, balance the injustice to the party seeking the amendment if permission is refused against the need for finality in litigation and injustice to the other parties and other litigants if the amendment is allowed. The court further observed that there is a heavy burden on the party seeking the adjournment to justify the lateness and why justice requires him to be able to pursue it.

23. Regarding the concept of lateness, the observations of Stuart- Simth J in **Vilca v Xstrata Limited, Compania Minera Antapaccay S.A.** [2017] EWHC 2096 (QB)[3] are instructive:

> "As will be seen below, the term 'very late amendment' has subsequently become almost a term of art, meaning an application made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. I shall adopt that meaning. Elsewhere it has been said that 'lateness' is a relative concept. I agree and would add that the natural elasticity of language and its use in the authorities shows that an amendment may be regarded as late either because it could have been brought forward earlier or because it is brought forward at a time that is liable to disrupt the efficient conduct of proceedings or both. The infinite variety of circumstances in which amendments may be brought forward means that there is a broad spectrum of potential impacts if an amendment is allowed, which is not dependent solely on chronological timing, and which may fall anywhere between the negligible and the devastating. In this broader post-CPR approach to amendments, the court is not limited to considering the effect on the parties and whether any potential prejudice may be satisfactorily compensated in costs, though there is no reason why these may not be relevant considerations in appropriate cases. The court will also have regard to the impact on the administration of justice in terms of potential disruption to the case in which the amendment is brought forward and in terms of the wider interests of the court, other litigation and other litigants."

**Analysis and disposal**

24. The application for permission to re-amend the Claimant's statement of case was, as stated elsewhere above, filed on the 25th of July 2023 initially as a without-notice application. The court advised the Claimant that the application should be filed with notice to the Defendant in order to have the Defendant have a say on the application. The application was, therefore, later filed as a with-notice application. At the time the application was filed, the trial date had already been lost by virtue of the adjournment that was already



[3] Par. 26

granted on the trial date itself. The reason for seeking the adjournment was that the Claimant had engaged additional counsel. There was no mention on the day that the Claimant desired to amend the statement of case. Either this was a deliberate non-disclosure to the court on the real intention behind seeking the adjournment or the idea to amend was a result of the fresh look on the matter by the additional counsel. In any case, although the date of trial had already passed by the time the application for permission was made, it is, nevertheless, the conclusion of this court that the application for permission was filed very late. The fact that the Claimant had engaged new counsel is irrelevant. The Claimant was at liberty to have engaged the additional counsel earlier on in the life of the matter. In any case, no reason was advanced why the Claimant found it necessary to engage additional counsel. There are no reasons given why the application for reamendment was brought at this particular time. All that Counsel Maliwa deponed in his sworn statement in support of the application was, and I quote him:

> "5. THAT the sought amendment will enable the claimant to better present his case against the defendant
>
> 6. THAT since the trial is yet to commence no prejudice will accrue to the Defendant since he can equally amend his defence.
>
> 7. THAT the interest of justice favours the success of this application"

25. As can be seen above, there is no reason given by counsel for bringing the application at the time it was brought. Other than stating that the amendment would enable the Claimant to better present its case against the Defendant, there is absolutely no reason advanced as to why the Claimant took so long to seek permission from the court to have its statement of case amended. There is not even any suggestion that the sought amendment is a result of new circumstances or recently discovered facts. The deponent simply says the re-amendment will enable the Claimant to better present its case against the Defendant. The Claimant ought to have done better to persuade the court that it had good reason for bringing the application at that point in time. It is my finding that the Claimant has failed to discharge its heavy onus to justify the re-amendment at this stage.

26. The extent and effect of the proposed re-amendment have already been alluded to elsewhere above. The intended re-amendment of the Claimant's statement of case is quite extensive. The original amended statement is three pages long. The intended re-amended statement of case covers nine pages and includes numerous new allegations and new claims including damages for defamation and exemplary and aggravated damages. Just by way of demonstration of the radical departure from the original case, in paragraph 16 of the intended re-amended statement case, the Claimant alleges that following the Defendant's sudden and unexpected change of words, position and undertaking, the Defendant breached its agreement to finance the export of the business, its undertaking contained in its profile and violated its brand promise to the detriment of the Claimant. It

is then contended that as a result of the above, the Claimant suffered loss, prejudice, inconvenience, and damage particularised as:

1) Loss of business
2) Loss of profits
3) Loss of opportunity to invest from secured interest.

27. There are numerous examples in the intended re-amended statement of case which bring out new allegations and matters: see for further examples paragraphs 20, 27, 29 and 32. Again there is no explanation why these new claims were not included in the Claimant's statement of case at an earlier stage in the proceedings. As the court found in the case of **Rose and others v Creativityetc and others** above, I also find that there is a radical change in the nature of the case that is intended to be put on behalf of the Claimant.

28. As regards the issue of prejudice/injustice, there is no doubt that if the intended re-amendment is allowed, the Defendant will be greatly prejudiced in several ways. Firstly, because, as found above, the case that is intended to be brought by the intended re-amendment brings in many other issues which were not initially in the original claim, the effect of allowing the re-amendment will be to bring the case back to square one. The Defendant will have to work on a new defence to deal with the new allegations and claims. The Defendant will further have to revisit and come up with new witness statements to deal with the additional issues. The Defendant will have to revisit its other documentation like list of documents to be used at the trial and also will have to rework its skeletal arguments as the ones already filed will have been rendered less useful. Further, there will almost likely be duplication of other relevant work on the part of the Defendant's lawyers in preparation for the new issues. It would, in the circumstances be idle, for the Claimant to claim that all this prejudice would be compensated by costs.

29. The other prejudice that would be suffered by the Defendant if permission to amend were to be granted, would be the loss of expectation of a trial in the near future. As it is, if the re-amendment were to be allowed, the parties would have to go back on the drawing board, so to speak, and it would certainly take quite some time before the file would be ready for trial again as the parties and the court would need to revisit some of the steps to ensure that the matter is ready again for trial. On the other hand, if the permission is not granted, all that the court needs to do now is to appoint another date for trial of the issues that are already before the court.

30. Further, it is the view of this court that allowing the re-amendment would result in the prolongation of the trial process. This would disrupt the court and disadvantage other court users who would have made use of the court resources including the additional time that would otherwise be channelled to this matter by reason of the re-amendment if allowed.

31. There is absolutely no doubt at all that the Claimant would suffer prejudice if permission is refused in that it will no longer pursue the issues it outlined in the intended re-amended statement of case. But this, as it may be, would be a calamity brought upon by itself. A self-inflicted wound, so to say. It is a situation brought about by its own conduct.

32. In the final analysis, I would like to indicate that the court would be abdicating from its responsibility towards promoting, ensuring adherence to and observance of the overriding objective at every stage of the proceeding if it were to grant the permission sought. For this and the other reasons given above, the application for permission to re-amend the Claimant's statement of case is denied with costs to the Defendant. The quantum of these costs, which are confined to those relating to the abortive application, will either be agreed upon by the parties themselves or assessed by the Assistant Registrar and be paid to the Defendant before other steps are taken in the proceedings. A new date for hearing the matter will only be given by the court after these costs have been paid to the Defendant.

Delivered in chambers this 12th day of February, 2024 at the High Court, Commercial Division, Blantyre Registry.



M.T. Msungama
**JUDGE**