

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

LILONGWE REGISTRY

Commercial Cause No. 259 of 2017

(being consolidated with Commercial Case Number 262 of
2017)

BETWEEN

CDH INVESTMENTS BANK LTD.....CLAIMANT

AND

FN INVESTMENTS..... 1ST DEFENDANT

ANDREW MUMBA t/a BLACKSON INVESTMENTS.....2ND DEFENDANT

WORLD VISION MALAWI.....3RD DEFENDANT

Coram: **Manda, J**

Dossi for the Claimant

Soko for the 3rd Defendant

M. Kachimanga Court Clerk/Interpreter

RULING

This is the third defendant's application to have the claimant's claim against them struck out for being frivolous and vexatious. The application was responded to by the claimant.

The brief facts of this case are that the claimant is an investment bank while the 1st and 2nd defendants are business entities. The third defendant is an international NGO. By separate agreements, the 1st and second defendants were awarded contracts of supply by the 3rd defendant.

Needing finance for those agreements, the 1st and 2nd defendant individually approached the claimant bank for loans and were duly given the said loans (MK15 Million and MK 16 Million, respectively). It was a further agreement between the claimant and the 1st and 2nd defendant that the proceeds of the contract with them and the 3rd defendant would be assigned to the claimant. In this regard the claimant and the 1st and 2nd defendants executed assignment of proceeds agreements, respectively.

The essential element of these assignment agreements were that the 1st and 2nd defendants agreed that whatever they were going to be paid by the 3rd defendant would be paid directly to the claimant. It was further the claimant's contention that the 3rd defendant did acknowledge the assignment agreements and guaranteed the same.

As it turned out, the 1st and 2nd defendants defaulted on the loans. This was on account that the money of the proceeds of sale was paid directly to them and not to the claimant bank as per the assignment of proceeds agreement. In view of this, the claimant went on to sue the 1st and 2nd defendant in two separate actions. The claimant then also added the 3rd defendant to those actions, which actions were then later consolidated into this action.

In this application, it is the 3rd defendant's argument that it was not privy to the assignment contracts between the claimant and the 1st and 2nd defendants and thus cannot be held liable under the same. Secondly, the 3rd defendant also argued that they did not guarantee the performance of the stated assignment agreements as they did not sign an accessory or collateral contract promising to be answerable for the default of the 1st and second defendants.

While agreeing that the 3rd defendant was not privy to the contracts of assignments, it was the claimant's contention that the 3rd defendant did acknowledge the said contracts and that they indicated that such acknowledgment was valid and binding. The paragraph which the defendant sought to rely on is contained in letters which the 3rd defendant wrote to the claimant with regards the assignment contracts which were executed by the 1st and 2nd defendant. I think for better context I need to reproduce the whole letter. The letters (exhibited as RV3 and RV4 and attached to the sworn statement of Ruth Vilili), are essentially the same and read as follows:

"We acknowledge receipt of this Notice of Assignment dated 28th May, 2014, referring to an assignment between FN Investment {Blackson Investments} (the "Customer") and you, as adequate notice of the assignment of the Customer's right, title, benefit and interest in respect of LPO Number 009192 {009470} being the contract (as defined in the Notice), and consent to that assignment

We confirm that we have not received notice of the interest of any third party in the Contract. We further confirm and acknowledge that we do not have of set-off or counterclaim in relation to the contract and that we are not aware of any breach of the contract or grounds upon which we are entitled to rescind the Contract (in whole or in part).

We confirm that we shall accept your instructions in relation to the Customer's rights under the Contract, and shall disclose to you such information in relation to the contract as you may, at any time and from time to time, request. We further confirm that we have received invoice number 044 dated 22nd April, 2014 {invoice number 4536524 dated 16th May, 2014} and shall make full payment of MK25, 000, 000 (Twenty five million kwacha only), under the contract in accordance with your instructions (i.e. we expect to issue the payment not later than 31st July 2014)

We confirm that we are a company duly incorporated under the laws of Malawi and have the power to enter into and perform obligations under this Acknowledgement, and such obligations constitute valid and binding obligations, enforceable in accordance with their terms"

The paragraph which the claimant seeks to rely on in this instance is the last one. According to the claimant that last paragraph clearly states that the "*acknowledgment is valid and binding and therefore the 3rd defendant cannot run away from their obligation under the letter*". The question however is what was the 3rd defendant's obligation?

A reading of the above letter clearly shows that the main purpose of it was to acknowledge receipt of the Notice of assignments. Then the letter goes on to inform that there are no any other third party interests. Then the letter goes on to express willingness to accept the claimant's instructions and goes on to add that they had received invoices and that the 3rd defendant was make payments according to the claimant's instructions.

The last paragraph, in my considered view, simply outlines the 3rd defendant's capacity to enter into agreements and does not in any way express an intention to enter into a legal relationship. This fact is even confirmed in paragraph 9 of the sworn statement of Khumbizeni Dossi which states that the instructions to the 3rd defendant were made on the 11th of November, 2014 but that the defendant opted not to act on them or respond to them. It was also the evidence of Khumbizeni Dossi that following the commencement of the legal proceedings there was another meeting held on the 14th of February, 2018, but the 3rd defendant still did not act on the instructions or respond to the letter.

In terms of the basic principles of contract law, there must be an offer and acceptance. Then there is also of course the principle of privity of contract. In the context of this matter, the 3rd defendant was clearly not privy to the assignment contracts and unless there was a clear intention by the 3rd defendant to be subjected to those contracts, the 3rd defendant is not bound by the assignment contracts. Granted the 3rd defendant did use the word "shall" which has been construed to be obligatory. However, what should be noted that the letter is just a proclamation and does not have the force or effect of law. There still was a need for the 3rd defendant to accept the claimant's instructions, which apparently the 3rd defendant never did, on two occasions!

Would the 3rd defendant be held liable for not accepting the instructions? I seriously doubt that the 3rd defendant would be held liable for not taking the claimant's instructions. This is more so because the primary obligation to honour the assignment contract still remains with the 1st and 2nd defendants. It is the 1st and 2nd defendant who pocketed the money and thus breaching their agreements. These it must be stated included the loan agreements and the assignment contracts. One would then wonder as to why the claimant would take all these years pursuing the 3rd defendant instead of going where the loss lies! This is more so considering that the 3rd defendant never guaranteed the loans and thus cannot be asked to indemnify the claimant. Asking the 3rd defendant to be liable for the loans of the 1st and 2nd defendant, would be giving the latter an unjustifiable "windfall". This would definitely be an absurdity!

Finally, I must state that I did not see the purpose of the claimant suing the 3rd defendant when its money lies with the 1st and 2nd defendants. This is a case of contract and not contributory negligence for the 3rd defendant to be asked to pay for the outstanding loans. The claimant has acknowledged that the 3rd defendant was not privy to the assignment contracts. Further the 1st and 2nd defendants are clearly not agents of the 3rd defendant for the claimant to claim that they are entitled to go after the "deep pocket".

Quite frankly I do not see any cause of action against the 3rd defendant and on this note I must dismiss the action(s) against the 3rd defendant for being frivolous and vexatious. What I can see here is really a situation of laissez faire by the claimant which clearly wants to sit on its right by inexplicably not going after its money. For a bank, the claimant's actions are quite careless! In view of this, the action(s) are dismissed with costs to the 3rd defendant.

Made this in Chambers this.....23rd.....day of.....March.....2023



K.T. MANDA

JUDGE