MALAWI
IN THE HIGH COURT OF MALA WI
COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CAUSE NUMBER 12 OF 2007

BETWEEN

NBS BANK L TD .....PLAINTIFF

-and-

BP MALAWI LTD .....DEFENDANT

CORAM: Hon Justice Dr. M.C. Mtambo

Mr. Tembenu, of Counsel for the Plaintiff Mr. Gulumba, of Counsel for the Defendant Mrs Mhone, Court Reporter
Mr. Mchacha, Court Clerk

JUDGMENT

Dr. Mtambo J.

1. **BACKGROUND**

This matter was transferred to this Division from the Principal Registry where it was first filed and partly handled under Order 22 rule 1 of the High Court (Commercial Division) Rules 2007. It involves a dispute relating to the continued operation of the Defendant's Chichiri Filling Station at Ginnery Corner Blantyre on the Plaintiff's land known as Plot Number BE 243 after the Plaintiff gave notice to the Defendant sometime in the year 2004 terminating their tenancy agreement by giving three months notice as provided in the last available tenancy agreement. It should be noted that the relevant tenancy agreement was signed between the Plaintiff and a predecessor to the Defendant namely Oil Company of Malawi Limited.

Despite the notice to quit, the Defendant has not obliged and maintains that unless the Plaintiff agrees to compensate it to the tune of K 165 ,821,000 being loss of revenue for the remainder of what it claims was an agreed fixed twenty year lease with the Plaintiff it will stay put. The twenty year tenancy agreement has not been produced but instead the Defendant has produced a trail of correspondence and documents which according to it reflect that a fixed twenty year lease was drawn up by the Plaintiff as per practice, given to the Defendant to sign and was signed by the Defendant who then forwarded it to the Plaintiff but that the Plaintiff did not return a copy thereof to the Defendant presumably after duly executing its part of the document. As attempts to amicably resolve the matter have prolonged without fruitful end, the Plaintiff has commenced the present proceedings seeking court orders to evict the Defendant out of its land and award of damages in the nature of **mesne profits** being the rentals unpaid for the entire period of holding over and loss of business during the period the Defendant has continued to be in occupation after the effective date of the notice to quit which are put at K213,000,000.

The Plaintiffs reasons for terminating the tenancy are that it is so entitled under the last existing tenancy agreement of the year 2000; there is need to use the space occupied by the Defendant as a parking lot for itself after relocation of its headquarters from Lilongwe to Blantyre in 2002/3 and growth of business; the Defendant's operations pose a fire hazard particularly in view of a fire which occurred near the premises in the not too distant past as has also been pointed out to the Plaintiff by the Reserve Bank of Malawi in their supervisory capacity with respect to commercial banks. The Defendant on the other hand has argued that the twenty year agreed period has not expired and also ironically that it needs the premises more than the owners, the Plaintiff.

The parking mess at the premises the subject matter of dispute is a matter of public notoriety. It is right in front of the busy Masauko Chipembere Highway for all and sundry to witness. The City Assembly of Blantyre has expressed concern to the Plaintiff about the congestion caused by the Plaintiff's and Defendant's customers at the area. The Plaintiff's chief witness has stated that both the Plaintiff and Defendant are losing business due to the situation. This is clearly a matter that requires urgent and swift resolution.

2. **THE PLEADINGS**

By amended Originating Summons, the Plaintiff claims for:

1. An order for repossession of part of premises known as Plot BE 243-244 which the Defendant continues to occupy after the termination of the lease agreement dated 8th July 2000 between the Plaintiff and the Defendant.

2. A declaration that the continued occupation by the Defendant of the Plot No. BE/243, Ginnery Comer, Blantyre is unlawful as it is contrary to the lease agreement between the Plaintiff and the Defendant;

3. A mandatory injunction for the delivery up of the said premIses by the Defendant to the Plaintiff;

4. A declaration and/or order that the continued occupation of the said premises after notice to vacate has resulted in substantial losses of income to the Plaintiff;

5. Costs of this action.

Additionally, the Plaintiff claims for

(i) Special damages for loss of business amounting to K213,000,000

It should be noted that the Plaintiff's Amended Originating Summons in which the claim for special damages is made does not provide particulars of the claimed damages of K213,000,000.

The Plaintiff's Originating Summons is supported by an affidavit sworn by Mr. Martin Ndenya, the Plaintiff's Financial Controller/Company Secretary who was not there at the material time between the years 2000 and 2002 as he only joined the Plaintiff's employ in January 2004. The witness therefore based his evidence solely on examination of company records. There was also a supplementary affidavit in support of the Originating Summons sworn by Mr. Elliot Jambo, the Plaintiff's Infrastructure Manager. He too, like Mr. Ndenya, was not present at the material time as he joined the Plaintiff's employ in 2004.

The Defendant filed an affidavit in opposition sworn by Mr. Powell Maimba who was at the material time between the years 2000 and 2002 working for the Defendant's predecessor Oil Company of Malawi Ltd. as Retail Network Developer responsible for the establishment of retail outlets for the company in the form of filling stations. He had first hand knowledge in the renewal of leases between the Plaintiff and the Defendant the subject matter of this action.

3. **THE EVIDENCE**

The evidence was in the form of affidavits in support of the Originating Summons and in opposition thereto sworn by Mr. Martin Ndenya and Mr. Elliot Jambo for the Plaintiff on the one hand and Mr. Powell Maimba for the Defendant on the other hand. Apart from the affidavits, Mr. Ndenya and Mr Jambo testified for the Plaintiff as PWI and PW2 whereas Mr. Powell Maimba and Mr. Hipolyte Mushi testified for the Defendant as DWI and D W2 at the trial.

PWI's evidence as it relates to the Plaintiffs claim for special damages requires a close examination. The witness testified that the Defendant's refusal to vacate the Plaintiffs premises which the Plaintiff intended to use as a car park impacted negatively on their business in that the Ginnery Corner branch was not able to meet its budgeted income in comparison to branches of a similar nature. This loss of business was put at K213 million. It should be noted that this witness did not give specifics about the average period and number of customers he was comparing, how many of their customers had cars and to what extent unavailability of parking space affected business at Ginnery Corner in view of the fact that the other branches of the Defendant do not have their own parking spaces and customers park elsewhere and walk to the bank He in fact at one point in cross examination admitted that his figures and analyses were incomplete but that he could provide further information if needed. The comparisons did not include National Bank of Malawi which has branches at Ginnery Corner and in Limbe and Blantyre just like the Plaintiff.

As all the witnesses except DWI were not present at the material time and their evidence was simply from records, DW l's evidence therefore becomes the most pivotal. At the trial, OW I testified that the Defendant redeveloped the Chichiri filling station as an investment through which the Defendant would get a return over a twenty year period. Exhibit D3, Defendant's internal memorandum of20 April 2001 titled "Re:Chichiri R&R Project Cost Reduction was tendered to justify the expenditure to be incurred by the Defendant. According to the memo, the cost of redeveloping the filling station was put at US$210,000. It is important to note that Exhibit 03 was not addressed or copied to the Plaintiff and no credible evidence was put forward to show that the Plaintiff knew the details of the cost of the project. DWI made a meal out of exhibits DI and D5 which were a letter from the Plaintiff to the Defendant dated 20 November 2000 approving the proposed redevelopment of the filling station by the Defendant and a letter from the Plaintiff to the Defendant dated 3 June 1999 reminding the Defendant to carry out necessary maintenance and redecoration. It is worth noting that the latter did not refer to the work as redevelopment but redecoration and the reason given by the Plaintiff was that the premises were not looking nice and not that there was need to enhance the returns to beef up rentals received by the Plaintiff as DWI would want this court to believe.

DWI further testified that he personally took to the Defendant's company secretary copies of a new lease agreement for sealing together with articles of agreement signed by the contractor who was redeveloping the Defendant's three stations. It is important to note that although the company secretary recorded the use of the company seal with

respect to the articles of agreement, no such clear record of the use of the common seal with respect to the alleged fixed twenty year tenancy agreement appears in the record book tendered as exhibit D4. The witness also testified that once the lease was sealed, it was forwarded to the Plaintiff for their further action and that subsequent efforts by him to follow up on the document proved futile. The witness referred to verbal and personal reminders for a period of about one year between 2001 and end of 2002 after the completion of the redevelopment of the Chichiri filling station when he left the country for Zambia. No written documentation relating to this important follow up matter was tendered to the court as it was non existent.

4. ISSUES

i) Whether the court can admit extrinsic evidence to add to, vary or contradict the terms of a written contract;

ii) Whether the written agreement of 8th July 2000 relied upon by the Plaintiff to terminate the tenancy agreement between the parties was rescinded by subsequent agreement;

iii) Whether specific damages have been pleaded and proved.

5. THE LAW AND DISCUSSION

Parol Evidence.

The parol evidence rule stipulates that where the terms of a contract have been reduced to writing, parol or extrinsic evidence can not be admitted to add to, vary or contradict the written terms. An illustrative case on this point is *Goss vs Lord Nugent* (1833) 58 & Ad. 58 at 84. However, learned counsel for the Defendant Mr. Gulumba has laid great emphasis on a number of exceptions to the general rule. He relies on Cheshire and Fifoot pp 123-127 on Law of Contract where it is observed that rigid adherence to the parol evidence rule has been criticized as it may involve ignoring evidence which a reasonable man might wish to consider in the interests of justice. In *Goss vs Lord Nugent (supra),* Denman C.J. in his judgment he delivered for the court having recognized the parol evidence rule, went further and stated:

> *..... but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in 11'riting, either altogether to waive, dissolve or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of, and thus to make a new contract, which is to be proved, partly by the verbal terms engrafted upon what will thus be left of the written agreement",*

On the basis of these authorities, the Defendant wishes to move this court to admit parol evidence to show that the 2000 lease was varied or replaced by a subsequent lease in the year 2001 after the redevelopment of the filling station.

Lost documents

Learned Counsel for the Defendant Mr. Gulumba has also drawn the court's attention to the law relating to proof of loss of a document in the manner that where the court is satisfied upon evidence presented to it that the document relied upon by a party has been lost, secondary evidence is admissible as to its contents. He cites the case of ***Barber vs Rowe*** (1948) 2 All ER 1050 where the Defendant claimed that he was entitled to renewal of his lease alleged to have been executed subsequent to the original lease of which signed copy he did not have. It was held that secondary evidence as to its contents in the form of the counterpart was admissible as there was satisfactory proof before the court of the loss of the lease. In his judgment, Cohen L.J., p. 1051 quotes Lord Cozens-Hardy MR in ***Read vs Price*** (1909) 2 KB 730 where the latter said:

> *"You may prove the existence of the writing by the ordinary law of evidence, and when the writing is lost, and the proof of the loss* is *satisfactory to the court, you may give satisfactory evidence of the contents of the lost document, just as in cases where writing* is *required under the statute of frauds you can always prove the existence of the writing by parol evidence, if proof is given of the loss of the written document".*

And further, Cohen L.J. observed:

> *"Indeed, were it otherwise section 40 might be made an instrument of fraud, for a person desirous of escaping from his obligation under a contract might destroy the written evidence of that contract, thus making it impossible for the opposite party to prove the contract. "*

The Defendant in this case also wishes to rely on ***Manda and Others vs City of Blantyre*** (1992) 15 MLR 228. In that case, the Plaintiffs were members of a musical band known as Love Acquarius Band. According to Unyolo J. (as he then was), the Defendant needed no introduction. The Defendant at some point took over management of what used to be known as Hotel Chisakalime in Blantyre where the Plaintiffs had a contract with previous owners to be performing there. The Defendants took over the Plaintiffs band but later wrote a letter of termination of contract claiming that the contract which the Plaintiffs had with previous management had not been renewed by them and that the Plaintiffs were therefore playing without a valid contract. The Plaintiffs denied the contract was not renewed after 31 March 1989 as contended by the Defendant's town clerk in his letter to them. According to them, a new contract was duly agreed orally and all that remained to be done was to reduce the same to writing. The Plaintiffs referred the court to an earlier contract which was agreed in April but reduced to writing and executed in December. The court found that it was probable than not that a renewed contract was agreed as the

nd continued paying them for six long months without a renewed contract.

The Defendant in the case at hand therefore submits that a 20 year fixed lease was agreed between the Plaintiff and Defendant in 2001 but is now unavailable or lost and extrinsic evidence should be accepted by this court to establish the existence of that subsequent lease.

On the other hand, learned counsel for the Plaintiff Mr. Tembenu has centred his case not on exceptions to the parol evidence rule but on the law relating to variation or rescission of contract and argued that on the facts there is no evidence of an agreement for such variation or rescission in relation to the lease agreement tendered in court and marked exhibit PI. On close examination of the Plaintiffs arguments, it is apparent that they do not dispute the correctness of the legal position as espoused by the Defendant. It is therefore clear that the decision of this court will centre not so much on what is the law but on whether on the evidence it is the Plaintiffs or Defendant's case which has been made out.

Special damages

Learned counsel for the Plaintiff Mr. Tembenu has cited the case of *Venetian Blind Specialists Limited vs Apex Holdings Limited* MSCA Civil Appeal Number 12 of 2003 in which the Malawi Supreme Court of Appeal affirmed the right to damages for consequential loss in the words:

> *"damages for loss of business or loss of profits are generally classified as special damages representing consequential losses. According to Lord Dunedin in The Susquehanna case, if there be any special damages which (are) attributed to the wrong act, that special damage must be averred and proved, and if proved, will be awarded".*

Mr. Tembenu further wishes to rely on McGregor on Damages 15th Edition at page 1140 (paragraph 1791 and the cases of *Riding vs Smith* (1876) 1 Ex. D. 91 and *Worsley vs Cooper* (1939) 1 All ER 290 where it is stated and held respectively that general falling off of business is sufficient proof of special damage. He therefore argues that since PWI testified in court to a general fall in the banking business at the Plaintiffs Ginnery Corner Branch allegedly due to unavailability of adequate car parking space, the court should award the K213 million damages claimed.

On the other hand, Mr. Gulumba, learned counsel for the Defendant wishes to rely on Odgers on Pleading and Practice 20th Edition where G.F. Harwood at page 181 states:

> *"Special damage ... is such a loss that the law will not presume to be the consequence of the Defendant's act, but which depends in part, on the special circumstances of the Defendant's case. It must therefore always be explicitly claimed on the pleadings and at the trial it must be proved by evidence both that*

1 was unable to indicate which of their customers had cars or not, what was the average period of comparison on loss of business, and therefore argues that the claimed damages should not be awarded.

6. FINDINGS OF THE COURT

My view is that the parol evidence rule and its exceptions is the law more relevant to the case at hand. It is indeed true that exceptionally, parol evidence can be invoked to establish the existence of, variation or amendment to a written contract as argued by learned counsel for the Defendant. However, crucially the court should be convinced on examination of the available evidence in each case whether such credible parol evidence exists to evidence the claimed agreement. In the cases of *Goss vs Lord Nugent*, *Barber vs Rowe*, and *Manda and Others vs City of Blantyre(supra),* there was satisfactory proof to the court of a contract having been entered into as claimed or the written document being claimed having been lost. Now, the question to exercise my mind is whether the Defendant has given me a satisfactory explanation on the basis of which I can find that the parties entered into a twenty year fixed lease which document is not available or has been lost as opposed to a year's lease renewable for twenty years annually. I must emphasize that since it is the Defendant who is claiming the existence of an agreement for a twenty year fixed lease, the burden is on it to adduce satisfactory evidence to me on a balance of probabilities of the existence of the alleged fact. The principle that the one who asserts must prove and the standard of proof in civil cases has been discussed by Denning LJ. in *Miller vs Minister of Pensions* [1974] 2 ALLER 372 at p.374 in the words:

> *"This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it is more probable than not" the burden is discharged but if the probabilities are equal it is not".*

Did the plaintiff and Defendant agree on a twenty year fixed lease

The only lease available is a year 2000 document tendered by the Plaintiff and marked exhibit PI signed by the Plaintiff and Oilcom Malawi Limited, predecessor of the Defendant. The Plaintiff did not have a copy of this lease which the Defendant provided them when the Plaintiff wanted to rely on the terms of an earlier lease to terminate the tenancy. The Plaintiff only had an earlier 1998 lease which according to its terms was expiring in the year 2003. It is therefore evident that the 1998 lease must have had its lifespan cut short by the introduction of the year 2000 lease. It is worth noting that the first and only reference to a period of twenty years can be found in clause 2 in the 2000

lease which says it is ***"subject to renewal for TWENTY YEARS annually".*** The pertinent clauses of the year 2000 lease agreement are reproduced hereunder:

> THIS LEASE, made and entered into this EIGHTH day of JULY in the year TWO THOUSAND between NEW BUILDING SOCIETY of P.O. Box 30350, LILONGWE 3 hereinafter called the Lessor, and OIL COMPANY OF MALAWI P.O. Box 469 BLANTYRE hereinafter called the Lessee WITNESSETH as follows:
>
> 1 THE LESSOR hereby leases to the lessee the following described Premises- PETROL FILLING STATION SITE ON PLOT BE/243, GINNERY CORNER BLANTYRE
>
> 2. THIS LEASE shall commence on 1^{51} August, 2000 and continues for a period of ONE YEAR expiring at midnight on the TWENTY FIRST day of JULY Two Thousand one subject to renewal for TWENTY YEARS annually.
>
> 3. THE LESSEE shall pay the LESSOR as rental for the premises the monthly sum ofKI5,897.00 payable quarterly in advance .....
>
> 4. THE LESSEE hereby covenants with the Lessor as follows:
>
> xii) To hand back the premises to the Lessor in good and tenantable condition upon the termination of this agreement;
>
> xiii» If any party to this agreement desires to terminate this agreement that party shall do so by giving the other party three months notice or paying that other party three months rent in lieu thereof.
>
> DATED the eighth day of July 2000

It is on the basis of this lease that the Plaintiff argues that there was no fixed lease for twenty years but only an annual lease renewable for twenty years.

On the other hand, the Defendant would want this court to find that a twenty year fixed lease was agreed upon mainly from the fact that the Defendant could not have expended so much money redeveloping a filling station where it would be required to vacate on a year's notice before having recouped its investment. Perhaps the most important piece of evidence to the Defendant is exhibit D4 which is a record of the use of the company seal to what DW1 claims was on a twenty year fixed tenancy agreement with the Plaintiff which document was prepared by the Plaintiff, executed by the Defendant by its company

secretary and sent to the Plaintiff to execute but never returned therefrom. It is interesting to note that the entry on exhibit D4 by the Defendant's company secretary reads:

> " *Atieles of agreement and conditions of contract for the redevelopment of Blantyre Main, Soche and Chichiri Filling Stations* ".

There is no mention of a lease or tenancy agreement in this entry but articles of agreement. Ironically, the Defendant also tendered exhibits D6A and D6B which appear to be the articles of agreement referred to in exhibit D4. Exhibits D6A and D6B are clearly not the tenancy agreement between the Plaintiff and Defendant as claimed by the Defendant's first witness. In fact, why would a whole company secretary who should be conversant with drafting legal terminology refer to a lease or tenancy agreement as articles of agreement? And why should the Plaintiffs and Defendant's names not appear in the entry as parties to the referred agreement? Further, the plot number referred to in exhibit D4 is different from the actual plot number of the filling station and DWl's explanation that both plot numbers relate to the filling station is not backed by written documentation from the Blantyre City Assembly or other relevant authority.

Another notable discrepancy in the Defendant's case relates to the time that the twenty year fixed lease was supposed to have been executed. DWl incredibly claims it was in 2001 after completion of the redevelopment of the Chichiri filling station. On the other hand, DW2 stated that it must have been before the start of the redevelopment of the filling station as the Defendant could not have expended such huge amounts of money before the governing document was executed. DW2's view of the matter seems to be the most logical and probable. If that view is accepted, then the lease executed between the parties prior to the redevelopment of the filling station must have been exhibit P I. After all, it refers to a twenty year period apparently for the first time though not in the fashion the Defendant would now prefer.

There was also a claim by the Defendant that its relationship with the Plaintiff was more of an investment agreement than a tenancy agreement as the Plaintiff was interested in the profits of the Defendant in that rentals charged would depend on sales levels at the filling station so that the twenty year lease should be readily inferred. However, looking at the difference in rentals paid by the Defendant to the Plaintiff in the 2000 lease and the claimed 200 I lease, the rentals payable to the Plaintiff after the redevelopment of the filling station are a meagre K21,000 per month up from K15,879 per month, hardly an indication of such a business partnership. And as observed elsewhere in this judgment, the initial letters from the Plaintiff written to the Defendant with respect to works at the filling station referred to redecoration as the premises were not looking nice and not redevelopment to enhance the revenues at the filling station. As such, in the absence of concrete evidence of awareness, the fact that the Plaintiff gave permission to the Defendant to conduct the works can not be looked at as an indication of appreciation of the huge expenses involved for it is normal to seek the landlord's consent before embarking on redevelopment exercises.

I therefore make a finding that the Plaintiff and Defendant agreed on a yearly lease renewable annually for twenty years and not a twenty year fixed lease.

Is there parol or secondary evidence to be admitted to establish the existence of a fixed 20 year lease in the circumstances.

As already observed, the only tenancy agreement between the Plaintiff and Defendant before this court is the 2000 lease which is stated in clause 2 thereof to commence on 1st August, 2000 and to continue for a period of one year expiring at midnight on the twenty first day of July Two Thousand one subject to renewal for twenty years annually. And as already pointed out, the burden of proof to show that a twenty year fixed lease replaced this lease is on the Defendant of whose star witness on the issue was DWl. Unfortunately for the Defendant, as pointed out elsewhere in this judgment, the evidence of this witness has glaring discrepancies to the point of incredulity. This witness impressed me as someone who goofed and is trying to patch up his deficiencies. It is clear that the Defendant did not do their homework in the matter of the renewal of the lease which is of great disappointment for a serious company such as the predecessor to the Defendant who should not have had any problem for such an expensive project tapping on the help of experienced lawyers to guide them through the minefields. And to make matters worse, the company secretary who made the entry in exhibit D4 was not called by the Defendant to testify so that he could shed more light on the glaring discrepancies in the Defendant's allegation that a fixed twenty year lease was executed although, according to DW2 the Defendant's current General Manager, the company secretary is still around working for the Defendant. I can only make an adverse inference that perhaps the evidence of this witness was going to do more harm than good to the Defendant's case as a result of which the Defendant opted not to call him. This is in view of the cases of *Maonga and Others vs Blantyre Print and Publishing Company Limited* (1991) 14 MLR 240 and *Leyland Motor Corporation Limited vs Mohamed* Civil Cause Number 240 of 1983 (unreported). In the former case, Unyolo J. (as he then was) observed at page 249 that:

> *"In a situation such as this it has been held, quite correctly in my view that, (fa witness who is available is not called, it may be presumed that his evidence would be contrary to the case of the party who failed to call him"*

And in the latter case, Banda J. (as he then was) held that

> *"Failure to call a material witness to testify on a material point may damage the case of the party who fails to do so as that failure may be construed that the story is fictitious* ".

But learned Counsel for the Defendant Mr. Gulumba has urged me not to lose sight of the fact that the negotiations between the parties took place without any legal representation and argued that the direction of Lord Wright in *Hillas & Co. Ltd. vs Arcos Ltd.* (1932)

All ER 494 at pages 503-504 should be followed. The judge observed:

> *"Businessmen often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute and subtle in finding defect: but on the contrary, the court should seek to apply the old maxim of English law. verba ita sunt intelligenda ut res magis va/eat quam pereat. That maxim does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail ...* ".

The Defendant therefore argues that I construe the agreement between the parties herein broadly and fairly by looking at the chronology of events vis a vis the agreement of 8th July 2000.

As observed above, I find it hard to countenance that such a large organization as the predecessor to the Defendant would engage in such big and expensive projects in such a naive and foolhardy manner bearing in mind resources at its disposal for proper legal services. If indeed that is the way the predecessor to the Defendant chose to carryon its business, then it has no one to blame if serious problems resulting into huge financial losses such as the matter at hand surface. I would therefore wish to depart from the dictum of the learned judge above. In any event, I have found no credible evidence of an agreement for a twenty year fixed lease between the parties in view of glaringly deficient and incredulous testimony of DWI. In that regard, terms can not be read or details filled into a non existent contract and a non existent contract can not be liberally or broadly construed. There is clearly no credible parol evidence in this case which can be used to add to, vary or modify the 2000 lease. Further, unlike in *Barber vs Rowe* (supra), DW1 did not produce before me a counterpart of the alleged twenty year fixed lease signed by them but not signed by the Plaintiff as secondary evidence on the basis of which the existence of the claimed twenty year fixed lease could be inferred. Surely, one would have expected the predecessor to the Defendant to at least photocopy and keep such an important piece of evidence just in case.

6. CONCLUSION AND DISPOSITION

The Plaintiff claimed for:

An order for possession of part of the premises known as Plot BE 243-244 which the Defendant continues to occupy after the termination of the lease agreement dated 8th July 2000 between the Plaintiff and Defendant.

I have found that there is no credible evidence of a lease agreement between the Plaintiff and Defendant superseding the 2000 lease. As such, the letter of termination of lease by the Plaintiff to the Defendant was within the four comers of the contract between the parties. Consequently, the Plaintiff succeeds on this head.

A declaration that the continued occupation by the Defendant of the Plot No. BE243, Ginnery Comer, Blantyre is contrary to the lease agreement between the Plaintiff and Defendant.

In view of my observations above, the Plaintiffs prayer is granted.

A mandatory injunction for the delivery of the said premises by the Defendant to the Plaintiff.

Despite the Defendant raising the issue that where damages would be an adequate remedy, the equitable remedy of an injunction should not be granted, the issue was neither specifically pleaded nor properly addressed in the Defendant's submissions although I may hasten to state that such damages, as is evident from the testimony of PWI, would be difficult to assess. I therefore grant the mandatory injunction prayed by the Plaintiff for the Defendant to deliver the premises known as Plot BE 243-244. Such delivery to be made forthwith. Though the Defendant may argue that it needs time to evacuate the Plaintiffs premises, I do not think that this court should be used by a party to perpetuate a wrong. In any event, the Defendant should have had a plan of action in place during the more than three long years that it has continued in unlawful occupation of the premises despite a proper notice to quit having been served on it by the Plaintiff. The Defendant will however need to put the premises in good and tenantable condition in accordance with clause 4xii) of the 2000 lease. The parties to agree on the period within which the Defendant should comply with that clause in view of the technical and environmental ramifications in issue. If no agreement is reached either party may make an application to court. Of course the Defendant will pay the Plaintiff mesne profits from the effective date of notice to quit up to date of rendering the premises in good and tenantable condition being rentals payable for that period at the applicable rental rate for the period in question if not paid already.

A declaration and */or* order that the continued occupation of the premises after notice to vacate has resulted in substantial losses of income to the Plaintiff.

As mentioned elsewhere in my judgment, the Plaintiff is entitled to mesne profits in the form of rentals at then and current prevailing rates up to the date the premises are rendered in good and tenantable condition.

Special damages for loss of business amounting to K213,000,000

Although this head of claim was pleaded, it was not done so with sufficient particularity. Further, as observed in my judgment, the evidence of PWI was not cogent and sufficient enough to prove a causal link between the alleged loss of business and the unavailability of a car park particularly in view of the fact that the other branches of the Plaintiff used in the comparison do not have car parks of their own and no comparison is available with respect to National Bank which also has a branch at Ginnery Corner. Further, PWI admitted in cross examination that his work was not complete. The court can not give PWI a second chance to properly explain his claim as he suggested for to do so would mean that there would be no end to this litigation. An order for assessment of damages could only be made if the Plaintiffs claim was for general damages and not specific damages as the case at hand. In the circumstances therefore this part of the Plaintiffs claim is dismissed.

Under section 30 of the Courts Act, costs of and incidental to all proceedings in the High Court are at the discretion of the court. However, in general, costs follow the event. This is in view of Order 62 of the Rules of the Supreme Court and the cases of *Chihana vs Speaker of the National Assembly and Malawi Electoral Commission* Misc. Civil Cause No. 2933 of 2005 (HC) (Unreported) and *Speedy's Limited vs Liquidator of Finance Bank* Comm. Case No. 14 of 2007. As the Plaintiff has substantially succeeded in its claims, the Defendant is condemned to costs of this action.

Pronounced at Blantyre in open court this 7th day of January, 2008.

Dr. M.C. Mtambo
Judge