IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 111 OF 2008

BETWEEN:

KRAZY COOL BEVEAGES LTD.....PLAINTIFF

- and -

NBS BANK LTD.....DEFENDANT

CORAM: CHIMASULA PHIRI J.
A. Malijani of Counsel for the plaintiff
Mrs Mulere of Counsel for the Defendant
Ms Y. Phiri – official interpreter

O R D E R

Chimasula Phiri J,

Having heard from both counsel and upon reading the documents filed herein I am satisfied that what the applicant is seeking is an equitable remedy. It is very well settled that such remedy is in the discretion of the court. A court exercises its discretion on principles that are fixed. It is a judicial discretion.

The application is made under Order 29 of the Rules of the Supreme Court and is supported by an affidavit of counsel for the applicant. Basically, there is a charge and a further charge and these added to K10 million. The applicant pledged its business property which is the subject of this application as security for the loan. It is admitted that there were occasions when the applicant defaulted on repayment. However, the respondent made a demand for repayment and subsequently advertised the property for sale. This is evident from the applicant's own affidavit as well as the affidavit in opposition. That far, I have no problem with the matter.

It is equally clear that the applicant defaulted and the respondent kept on sending reminders on such default on capital repayment interest and penalties. It is clear that the applicant failed to observe the terms of agreement but probably convinced the respondent that it was willing to settle the loan. It then became very clear that the applicant would not fulfil the terms of the charge and further charge in terms of the instalments outstanding and the penalties that had accumulated. In September 2007, there was a breakthrough in the discussions between the parties which was like entering a new agreement which was supposed to have seen its end by March 2008. The applicant complied with that new arrangement and by November, 2007 a payment of K9 million had been made to the respondent. Come December, 2007 there was a shortfall in the payment by the applicant to the respondent and this default exceeded the agreed terms by 3 days. The respondent was in no mood to compromise and proceeded on its right to offer the property to another person. In that arrangement an offer has been made and indications are that it has been accepted save that payment is put on hold.

I have looked and considered the law and cases on this matter. It is clear that whenever there is default and that the chargee is exercising its right of sale, it does so, on trust and any excess money is held on trust for the chargor. Therefore it is imperative that the chargee should exercise caution and good faith in such a sale. If the motive of the chargee is merely to recover its loan, that is demonstration of bad faith and a court of equity will not allow it. In the circumstances the chargee is even supposed to get a proper valuation of the property to determine and ascertain the current market value of such property whether the sale be by private treaty or tender. In the present matter, no valuation report has been exhibited by the respondent to show that it took into account the interests of the applicant. The fact that the applicant is in default does not mean that it has no vested proprietary beneficial interest in the property.

The views of this court are that the respondent has acted in an oppressive manner despite the applicant's default. It has not been challenged by the respondent that when the applicant had the means to settle the December 2007 instalment, the respondent refused to accept such payment. This is a clear pointer that the respondent was not acting in good faith.

I appreciate that this is a commercial transaction and the parties must set out their own parameters for execution of their agreement without interference from the court. The respondent should have waited until March, 2008 to ensure that fairness and justice is not only done but seen to be done. I allow the application for injunction and order that the respondent be restrained from selling or disposing of the property to a third party. Let the arrangement that was made between the parties be executed as agreed.

The issue of costs is discretionary. The applicant is not an angel – actually it is its default that triggered the current scenario and I condemn the applicant to pay costs for this application. There is issue of possible liability to damages against the respondent – the respondent says that the agreement with the third party is not fully concluded, hence, it is the expectation of the court that no liability will arise. In the event it does, the respondent should be liberty to seek indemnity from the applicant if it can be established that the applicant was the major player to such liability.

MADE in chambers this 24th January 2008.

Chimasula Phiri

JUDGE