IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause No. 199 of 2011

Between:

Nick Kachingwe.....Plaintiff

And

NBS Bank Limited.....1st Defendant

And

Trust Auctioneers & Estate Agents (1980) Limited.....2nd Defendant

Coram: Honourable Justice A.C. Chipeta
Nyimba, of Counsel for the Plaintiff
Mbeta, of Counsel for the Defendant
Mwanyongo, Official Interpreter

RULING

The application before me is an *inter partes* Summons from the Plaintiff, Nick Kachingwe t/a J & K Restaurant. It is aimed at the issue of an Interlocutory Order of Injunction against the Defendants, NBS Bank Limited and Trust Auctioneers & Estate Agents (1980) Limited. I heard the application on 10th June, 2011 during the week I was the Interim Applications Judge. This is because by the time it was being set down for hearing all other Judges had their business for the week pre-set, and so they could not have been available to take it on. Having read the Application, its supporting Affidavit, its Skeleton Arguments, the Defendants' Affidavit in Opposition, and the Defendants' Skeleton Arguments, and having heard the parties' respective Counsel present the application orally, I am satisfied that the matter in contest, which is the focus of this application, lies within a very narrow campus. It is not my intention, therefore, to grace it with a long and labored ruling. In as far as it might be possible, therefore, I will confine myself to the heart of the matter and quickly come to a decision thereon.

It is common ground on the facts available that between the Plaintiff, as Nick Kachingwe, and the 1st Defendant, the NBS Bank Limited there has for a number of years now existed a "Debtor/Creditor" relationship. This has been so in respect of a number of Overdraft Facilities. In these relationships, however, sometimes the Plaintiff has transacted with the first Defendant under the Trade Name J & K Restaurant, the capacity in which he has sued the Defendants in this case, while in other instances he has transacted under the Trade Name Nick Motel. It is also clear from these same facts, that not all repayments have progressed well in all these accounts, as there are still sizeable outstanding balances in all, if not most, of them. Apparently, there are in place arrangements regarding how the Plaintiff is

expected to service or is servicing these loans/debts. Specifically, in relation to Overdraft Account No. 0080486166014, which appears to have triggered the need for the present application, the Defendant's exhibit "MM 4" makes it clear that the Plaintiff has previously had problems of defaulting in his repayments. That exhibit, which is a Demand Notice dated 25th January, 2010, clearly spells out how unsatisfactorily the Plaintiff had been servicing that facility up to that date. Through that letter the first Defendant demanded from the Plaintiff full repayment of the then outstanding balance and interest, as well as threatened either legal action or realization of security in event of his failure to repay.

It is further clear that despite this threat, the relationship of the parties on the above-mentioned account survived beyond the 14 days ultimatum that was given in exhibit "MM 4." As can be seen, some five or so months beyond that threat, *per* the Defendants' exhibit "MM 1," which is a letter dated 8th June, 2010, the Plaintiff wrote to the first Defendant to plead to service this account with lower installments than could otherwise have expected. The first Defendant proved understanding. In the result the two of them ended up agreeing to restructure the Overdraft in question into a loan repayable between July, 2010 and 25th December, 2011. Today, as I determine this application, it is only 17th June, 2011. There is, therefore, still a balance of six months to go before this agreement expires.

It is worth noting that this new agreement of the parties was reduced into writing by the first Defendant itself, and that it was duly accepted by signature of the Plaintiff at its bottom on 2nd August, 2010, as *per* the request of the first Defendant. The Agreement in question is exhibit "NK 1" on the part of the Plaintiff and exhibit "MM 2" on the part of the Defendants. In my understanding, when the Plaintiff and the 1st defendant were so coming to this new arrangement in the middle of the year 2010, they were erasing and/or replacing the arrangement that had existed between them at the beginning of that year, as amply depicted by the Letter of Demand dated 25th January, 2010. If, therefore, defaults were to occur subsequent to their entry into this new arrangement, then one would expect that fresh ways of enforcement would have to be resorted to, rather than reverting to the pre-agreement threats or ultimatums.

Now, what is surprising is that regardless of the manner in which this new arrangement has so far fared, there is no sign that the 1st Defendant has in any way been pro-active in supervising compliance with the terms of the new agreement. What, however, has awakened an arrangement that had otherwise gone to sleep, is the Plaintiff's effort to ask for more favours from the first Defendant. Finding himself struggling with the debt even under current arrangements, he on 24th May, 2011, by his letter exhibited as "NK 2,"decided to try his luck with the 1st defendant once more by asking for a further easing of his terms of repayment. Thus, whereas by the agreement contained in the letter of 27th July, 2010 the Plaintiff was meant to clear the debt herein by Christmas Day this year, his request to the first Defendant this time round was to be allowed to carry on the repayments with even smaller installments than had been agreed.

One would tend to think that a sober assessment of the Plaintiff's new request would be seen as an attempt by him to push his luck to the extreme. Considering that the new agreement was still alive and operational until the end of this year, and further considering that the first Defendant does not appeared to have so far overtly expressed its misgivings about the way the new arrangement was going, one would have expected that the 1st Defendant was not going to be emotional and/or erratic in the face of its receipt of this request, that it could have taken one of two courses of action on it. It was open to the first Defendant to further sympathize with the Plaintiff, as it had done in July/August, 2010, and accordingly give a sympathetic ear to his woes. It was, however, also quite open to the said Defendant to just put its foot down and say that it will not allow the Plaintiff any more indulgencies, while at the

same time insisting that he must abide by, and not depart from, the agreement that still had half a year to go.

Contrary to expectation however the first Defendant did not take the Plaintiff's request in good spirit. It got so annoyed with this request that instead of just rejecting it with a big "NO," it through exhibit "NK 3," a letter dated 31st May 2011 completely went overboard in reacting to the same. Thus, instead of just confining itself to responding to the Plaintiff on his request regarding the J & K Restaurant Account 008046166014 in the light of the restructuring that was done on its overdraft on 27th July, 2010, the first Defendant opted to go to town on the Plaintiff in terms of all his other indebtednesses, even those under the Nick Motel accounts. It went so far as to dig up the dead and buried Letter of Demand of January, 2010, which had by consensus been replaced with the "July, 2010 to December, 2011 agreement." Referring to the impotent and displaced threat, it accused the Plaintiff of neither having heeded the demand that had been made in it, nor paid off the overdraft. It then stated that in the light of the Plaintiff's unsatisfactory performance in his credit facilities (not just the facility the request had been made on), based on that ground it could not accept any further proposals from him. It then added that it would therefore proceed with the collateral realization to protect its interests.

It is undoubtedly clear to me in the scenario the evidence presents that in this instance the NBS Bank Limited overreacted to the Plaintiff's request. As I have already indicated, it could easily and adequately have answered the request by just rejecting it. As the Plaintiff was just asking for a favour, the Bank need not have felt as if he was forcing it to give him a positive reply. In getting into tantrums, therefore, by extending its reaction to all other Overdraft Accounts he had with the Bank, instead of only concentrating on the one the request related to, and in crying foul about the Plaintiff's failure to attend to a Letter of Demand, which it had waived almost one year before, the first Defendant's reaction was no different from that one would expect from a snubbed child holding an old and expired grudge.

NBS Bank Limited is a juristic person. As such, more than a flesh and blood human being on the street, I would *prima facie* expect it to stick to the agreements it enters into, as *per* the maxim *pacta sunt servanda*. I would equally *prima facie* expect it to pay attention to the requirements of the Law on recalling security in event of defaults in repayments, as captured in the Registered Land Act. Considering that it was a party to the establishment of its January, 2010 ultimatum, and to the introduction of a new 2010/2011 repayment order, I would in the circumstances have expected a much more sober reaction from it than it displayed when it got this new request from the Plaintiff. If anything, it would appear that the most extreme it could rightly have gone, if it felt that the Plaintiff was, through this request, taking it for granted would, I believe have been to respond by giving him Statutory Notice of the realization of Security if indeed there have been further defaults in payments since the new agreement came into force. This, it appears to me, is the only legitimate way it could have given the Plaintiff that it was, as a result of the request, pulling out of the "July, 2010 to December, 2011 agreement." The shortcut it strikes me as having been somewhat immature.

It should be clear from the above that the Plaintiff has amply shown me that pending the determination of the main suit, his application meets with the requirements for him to be aided by an Interlocutory Order of Injunction *vis-a-vis* the consequences of the first Defendant's unexpected and emotional reaction to his request. It would be catastrophic if the Defendants were not to be restrained, and if they were then allowed to realize security, when if the Defendant had not made this request chances are that they might not have bothered him until 25th December, 2011, as *per* the agreement he still has with the first Defendant on Account No. 008046166014. It would equally be amiss, in my view, if the immediate realization of the security herein will have the effect of depriving the Plaintiff of the benefit

of an agre[illegible]ment [illegible] the first Defendant freely agreed to, and sanctioned to run up to the end of this [illegible] because this request, which has come some six months before the end of the said agreement, [illegible]yed it, and also just because the first Defendant believes that even if might later be found to [illegible] it will be in a position to pay damages. Pending the outcome of the commenced action, th[illegible]rant to the Plaintiff the Interlocutory Order of Injunction he has applied for. This is on the co[illegible]t he must undertake to pay damages in case it should later be held that he has obtained [illegible]wrongfully. A formal Order should be drawn and served.

I order

Made in [illegible] 17 [illegible] day of June, 2011 at Blantyre.

A.C. Chipeta
JUDGE