JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 201 OF 2015

BETWEEN

MIKE CHILEWE ..... 1ST PLAINTIFF

MIKE'S TRADING GROUP LIMITED ..... 2ND PLAINTIFF

AND

NBS BANK LIMITED ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Hara, of Counsel, for the Plaintiffs
Mr. Kauka, of Counsel, for the Defendant
Mr. O. Chitatu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

Introduction

This is an application by the Defendant for an order that an inter-partes interlocutory injunction that was granted herein to the Plaintiffs on 18th February 2016 be discharged [hereinafter referred to as the "Defendant's application"]. The Defendant's application is brought under "Order 29 Supreme Court of Appeals Rules".

The inter-partes interlocutory injunction restrains the Defendant from proceeding to sell and extinguish the Plaintiff's right of redemption of land registered in the Deeds Registry as Number 82678, situated in Mulanje District, and more commonly referred to as "Nakatete Resorts" until the hearing and determination of the originating summons or a further order of the Court [hereinafter referred to as the "injunction"].

The injunction was obtained shortly after the Plaintiff had commenced an action against the Defendant by writ of summons claiming several orders/declarations and damages in connection with a dispute between the Plaintiffs and the Defendant concerning the Nakatete Resorts.

Factual Background

In or about 2011, the 2nd Plantiff obtained a loan facility from the Defendant to finance the construction of Nakatete Resorts. In 2014, the Defendant began to demand repayment of the loan and, subsequently, the Defendant began to exercise their right of sale of Nakatete Resorts.

No serious buyers having offered to buy Nakatete Resorts, the 2nd Plaintiff negotiated with the Defendant that it be allowed to redeem Nakatete Resorts. It was mutually agreed that the 2nd Plaintiff should exercise its equitable right to redeem Nakatete Resorts. Under the agreement, the 2nd Plaintiff were to service the loan facility by engaging potential buyers who would buy off Nakatete Resorts from the 2nd Plaintiff or finance the servicing of the loan facility. The 2nd Plaintiff engaged several potential buyers and banks, including UK Security Services.

It is the case of the Plaintiffs that the Defendant, on 12th March 2015, back tracked on the agreement and deliberately purported to frustrate the Plaintiffs' right to redeem Nakatete Resorts by directly approaching UK Security Services for the sale of Nakatete Resorts at an undercut price of MK300,000,000.00.

The Defendant's Application

The Defendant's application is supported by an affidavit, sworn by Mercy Thandi Mulele, the Defendant's Head of Legal Services, wherein she states as follows:

> *"5. **THAT** subsequent to 18th February 2016 the plaintiffs approached the defendant and engaged the defendant in "without prejudice" discussions on how best to resolve the matter outside court. Those discussions culminated in an agreement as follows:*
>
> *(i) The plaintiff shall pay the defendant the sum of K405,000,000.00(on or before the 31st day of July 2016) in full and final satisfaction of the plaintiff obligations towards the defendant;*
>
> *(ii) Upon payment of the said sum the defendant shall execute a reassignment of mortgage in favour of the plaintiffs and shall return to the plaintiffs all title documents held by the defendant as security for the finances provided by the defendant;*
>
> *(iii) The plaintiffs shall pay party and party costs to be taxed if not agreed;*

(iv) *In the event of default in payment of the sum of K405,000,000.00 (a) the sum payable shall be K651,468,998.13 together with interest at applicable rates from 13th June 2016 to date of payment; the sum of K651,468,998.13 being what was actually due and owing a at 13th June 2016 (b) the defendant shall be at liberty to realize the security given for the facilities and the plaintiffs shall be under an obligation to yield vacant possession of the property.*

There are now produced and exhibited hereto appropriately marked copies of the following letters:

1. *Plaintiffs' letter dated 12th April 2016 –* **"MTM 1"**
2. *Plaintiffs' letter dated 24th May 2016 –* ***"MTM 2"***
3. *Defendant's letter dated 13th June 2016 –* ***"MTM 3"***
4. *Plaintiffs' letter dated 16th June 2016 –* ***"MTM 4"***
5. *Defendant's letter dated 27th June 2016 –* ***"MTM 5"***

6. ***THAT*** *subsequent to the agreement a Consent Order was sent to the plaintiff's lawyers who have to date not signed the same. There is now produced and exhibited hereto respectively marked* ***"MTM 6"*** *and* ***"MTM 7"*** *letter dated 14th July 2016 and the Consent Order referred to in the letter.*

7. **THAT** *I verily believe that the parties' agreement amounts to changed circumstances warranting discharge of the order of injunction granted herein"*

"MTM 1" is headed "Proposal/Commitment to Settle Loan". It refers to a meeting in which the Plaintiffs were asked by the Defendant as to how the Plaintiffs intended to settle K649, 931.592.34 loan facility and then states as follows:

> *"We made a Settlement proposal where we requested the bank to reduce the Interest which currently stands at K506,096,884.39 by 50% which culminates into K253,084,442.20 then add the Principle at K143,884,707.95*
>
> ***Our proposed Total sum of K396,883.150.14 would be settled in full by end June, 2016 through finance from Business Partners.***
>
> *IF Business Partners won't refinance the debt, we have also engaged NFB with a similar proposal.*
>
> *To cap it all, we'll use all the opportunities to clear this balance in full by end June, 2016."* – Emphasis by bolding and underlining supplied the author of the letter

In **"MTM 2"**, the Plaintiffs essentially state that they are agreed to pay the sum of K396, 833,150.14 and not K420, 000,000. **"MTM 3"** sets out the terms of the settlement agreement and it reads:

"We wish to advise that the bank has accepted your proposal subject to your financiers giving us written confirmation that they have indeed approved the loan.

If this condition is fulfilled, a consent order should be drawn on the following terms:-

1. *Mike's Trading will pay the sum of K405,000,000.00 (FOUR HUNDRED AND FIVE MILLION KWACHA ONLY) in full and final settlement of their credit facilities with the bank currently standing at K651,468,998.13 (SIX HUNDRED FIRTY ONE MILLION FOUR HUNDRED SIXTY EIGHT THOUSAND NINE HUNDRED NINTY EIGHT KWACAH THIRTEEN TAMBALA ONLY);*

'2. *The said payment will be paid on or before 15th July, 2016;*

3. *Upon signing of the Settlement Agreement and Consent Order, the bank will freeze interest on the facilities;*

4. *If there is default in the payment on the agreed date, the bank will charge the full interest on the amount outstanding and recover the same from Mike's Trading.*

In the event of default in payment;-

5. *The bank shall immediately sale the property used as security in this loan without the need for any further notice to Mike's Trading, and Mike's Trading shall be obliged to yield vacant possession of the property to pave way for the sale;*

6. *Upon payment of the amount in Point 1 above, the Bank shall release the security to Mike's Trading Financiers;*

7. *Mike's Trading shall bear the party and party costs for the court case;*

Please note that we should receive the confirmation from your financiers and a draft Consent Order through our lawyers by Tuesday, 21st June, 2016 falling which our lawyers will continue pursuing the court case."

"MTM 4" is a response to **"MTM 3"** and the relevant part of **"MTM 4"** is in the following terms:

"We find a few issues misrepresented and worthy correcting before proceeding with Consent Order

Ref:

2. *The said payment will be made on or before 15th July, 2016 this should read the said payment will be made on or before 30th July, 2016 per what was proposed and agreed upon in the meeting, please make corrections*

Paragraph below No. 7 wasn't part of our agreement in that meeting therefore should not be included as we cannot enforce the financiers into making a quick approval as that would only scare them away.

You will appreciate that this is an international lending institution which follows strict due diligence and cannot cut corners in making their decisions."

According to "**MTN 5"**, the Plaintiffs' proposal to settle the whole debt on or before 30th July 2016 without the need for a confirmation from the Plaintiffs' financiers was accepted by the Defendant. **"MTN5"** ends with the following note:

"Please note that the condition of this acceptance is that if payment is not made by 30th July, 2016 the bank will be at liberty to sell the security and realize the whole outstanding loan."

"MTM 6" is a letter under whose cover the Defendant sent to the Plaintiffs **"MTM 7"**, that is, a Consent Order, in triplicate, for execution by the Plaintiff. **"MTM 7"** seeks judgement to be entered in favour of the Defendant in the following terms:

"(i) The plaintiffs shall pay the defendant the sum of K405,000,000-00 (on or before the 31st day of July 2016) in full and final satisfaction of the plaintiffs obligations towards the defendant;

(ii) Upon payment of the said sum the defendant shall execute a reassignment of mortgage in favour of the plaintiffs and shall return to the plaintiffs all title documents held by the defendant as security for the finances provided by the defendant;

(iii) The plaintiffs shall pay party and party costs to be taxed if not agreed;

(iv) In the event of default in payment of the sum of K405,000,000-00 (a) the sum payable shall be K651,468,998-13 together with interest at applicable rates from 13th June 2016 to date of payment; the sum of K651,468,998-13 being what was actually due and owing as at 13th June 2016 (b) the defendant shall be at liberty to realise the security given for the facilities and the plaintiffs shall be under an obligation to yield vacant possession of the property"

The Plaintiffs are opposed to the Defendant's application on three grounds, namely, that (a) the Defendant's application has been brought under a non-existent Order, (b) the negotiations leading to the agreement constituting the changed circumstances were held on a "without prejudice" basis and, as such, evidence thereof cannot be brought before the Court and (c) that there was no agreement.

Whether or not Defendant's Application Brought under Wrong Law

With respect to the first ground, Counsel Hara submitted that the Defendant's application is irregular in that it was brought under a wrong law, namely, Order 29 of the Supreme Court of Appeal Rules. He invited the Court to note that the Supreme Court of Appeal Rules are subsidiary legislation under the Supreme Court of Appeal Act and they apply to proceedings in the Supreme Court of Appeal and not the High Court. Further, the said Rules only run up to Order V. Counsel Hara contended that as no application had been made to amend the Defendant's application to reflect the correct provision under which it was being brought, the same should be dismissed.

In his response, Counsel Kauka conceded that the Defendant's application mistakenly referred to Order 29 of the Supreme Court of Appeal Rules but vehemently denied that the Plaintiffs were prejudiced by the mistake. He submitted that as it is common knowledge that (a) the Supreme Court of Appeal Rules do not contain Order 29 and (b) matters pertaining to injunctions in the High Court are dealt with under Order 29 of the Rules of the Supreme Court, it is clear that the Defendant's application was dealing with Order 29 of the Rules of Supreme Court. Counsel Kauka placed reliance on the maxim *"falsa demonstratio non nocet cum de corpore constat"*, which means a false description doesn't void a document if the intent is clear. It is sometimes used to correct an obvious mistake: see Dowtie's Case 3 C0. Rep. 643

Having considered the submissions of both Counsel on the first ground, I agree with Counsel Kauka that the Plaintiffs were not prejudiced by the clerical mistake in specifying the law under which the Defendant's application was made. First and foremost, it has to be borne in mind that the injunction that the Defendant seeks to vacate was obtained under Order 29 of the RSC. I am, therefore, not persuaded that the Plaintiffs could not have known that the Defendant's application had to be grounded on the same Order. I am fortified in my view by paragraph 1.4 in the Plaintiffs Skeletal Arguments in Opposition to Discharge of Injunction which states that "Perhaps the Defendant desired to bring the application under Order 29 of the Rules of the Supreme Court 1999…). In any case, I have read and read the Plaintiffs' Affidavit and I have found no mention therein about any prejudice. In the circumstances, it my finding that the Plaintiffs were neither ambushed by the Defendant's application nor prejudiced by the reference therein to Order 29 of the Supreme Court of Appeal Rules instead of Order 29 of the RSC.

"Without prejudice" Correspondence

Counsel Hara submitted that the correspondence before the Court, that is "MTN1" to "MTN8" were written in the spirit of attempting to settle the matter amicably on a "without prejudice" basis. It was argued that such correspondence could not be used in Court against either party because it was written with the intention that it should not be so used.

Counsel Hara also submitted that the Supreme Court of Appeal decision in **Construction and Development Ltd v. Munyenyembe 12 MLR 292**, [hereinafter referred to as the "**Munyenyembe Case**"] which related to Order 27, rule 3 of the RSC on Judgement on Admissions, is distinguishable from the present application in that:

> *"3.5 The decision of the Supreme Court clearly was on the question, whether there be a judgement on admissions. The Court went at length to look at whether the letters and correspondence in that matter amounted to clear and unequivocal admissions so as to enter Judgement on admissions.*
>
> *3.6 The within application is not a summons to enter judgement on admissions where the Court should look at the correspondence between the parties; and the totality of evidence and decide that there was clear and an equivocal admission of facts creating an independent contract and waive the without prejudice rule."*

In **Munyenyembe Case**, the Supreme Court of Appeal made the following important observation:

> *"The words 'without prejudice' serve to protect the position of the writer if what he proposes is not accepted and if what he proposes has been accepted, an independent admission is established."* - Emphasis by underlining supplied

In the course of its judgment in **Munyenyembe Case**, the Supreme Court of Appeal cited with approval the following dicta by Lindley LJ in **Walker v Wilsher [1889] 2 QBD 335**, at page 337:

> *"What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."- Emphasis by underlining supplied*

I reject the contention by Counsel Hara that the principle in the **Munyenyembe Case** has to be confined to cases where a party seeks to enter judgement on admissions. In my view, the principle does not only apply applications for judgement on admission: its scope of application is much wider and I am satisfied that the principle applies to the present case.

Whether or not the negotiations led to an agreement

Counsel Hara contended that even if, for the sake of argument, it were to be accepted that the "without prejudice" communication can be relied upon, there was no agreement to constitute a formal settlement as evidenced by the fact that there was no signing or execution of any settlement agreement or execution of any Consent Order.

To buttress his argument that there was no agreement, Counsel Hara invited the Court to have a look at MTM4. In his view, MTM4 shows that there were two notable issues that had to corrected before proceeding with a Consent Order, namely, (a) that while the Plaintiff proposed K396,833,150.14, the Defendant proposed K405,000,000.00 and (b) there was a dispute as to the time of payment.

A perusal of the correspondence leaves me in no doubt that the parties reached an agreement. **MTM 1**, **MTM 2** and **MTM 3** show that the parties are in negotiations. By **MTM 4**, the Plaintiffs accepted all other previously agreed terms subject to two matters, that is, they want (a) the date of payment changed from 15th July 2016 to 30th July 2016 and (b) the term relating to financiers' undertaking removed from the agreement.

It is noteworthy that by **MTM 4**, the Defendant accepted the Plaintiffs' *"proposal to settle the whole debt on or before 30th July, 2016 without the need for a confirmation from your financiers"*. The fact that the parties had not executed a formal settlement agreement and/or a consent order is neither here nor there,

Conclusion

To sum up, I have come to the conclusion that the "without prejudice" rule is not applicable in the present case since what the Plaintiffs had proposed was accepted by the Defendant. I also agree with Counsel Kauka that the correspondence between the parties led to an agreement which amounts to changed circumstances. In the result, the injunction cannot be sustained. It has, accordingly, to be discharged with costs. I so order.

Pronounced in Chambers this 28th day of February 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE