



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

Civil Cause Number 180 of 2015

BETWEEN:

TIMEYO GONDWE.....PLAINTIFF

AND

OPPORTUNITY BANK (MALAWI) LIMITED.....DEFENDANT

CORAM: **Ms CM MANDALA: ASSISTANT REGISTRAR**
Mr Machika: Counsel for Plaintiff
Mr L Ulaya: Counsel for Defendant
Mr PW Chitsulo: Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a judgment entered on 6th March 2017 by the Honorable Justice K Nyirenda. It was adjudged that the Defendant was liable and that the Defendant should compensate the Plaintiff for losses incurred as a result of the wrongful and unlawful holding of the original Title deed registered as Title number 6881 and costs of the action.

The Plaintiff commenced the present action on 4th June 2015 by way of originating summons seeking the following orders and declarations:

- (1) A declaration that the Respondent's conduct in holding on to the original title deeds registered as Deed Number 6881, property of the Applicant, after repayment of the loan was oppressive, unreasonable and resulted in serious financial losses to the Applicant;
- (2) A declaration that the Respondent's conduct in holding on to the original title deeds registered as Deed Number 6881, property of the Applicant was wrongful and without legal basis and the Respondent liable to compensate the Applicant for the loss and damage occasioned thereby and
- (3) Any further order the Honourable Court may make including an order for costs.

EVIDENCE

The Plaintiff identified and tendered his witness statement as his evidence in chief. It stated as follows:

I, TIMEYO GONDWE, C/O Tembenu, Masumbu & Company, PO Box 5462, Limbe in the Republic of Malawi, make the following statement in this matter:

1. *I am the Plaintiff in this matter.*

2. I operate a business under the name Divine Industrial Safety Specialists situated in Limbe whose offices and shop are in Mrs Alina Gomez Building Room No 7.
3. I started this business in 1997 and I supply various safety and hardware supplies to individuals and companies.
4. In 2013 I took a loan from Opportunity Bank (Malawi) Limited worth MK2, 000,000.00 payable within 12 months with an aim of boosting my business to satisfy and meet my clients demand.
5. I pledged my commercial property, a lodge, situated in Mpemba as collateral to the loan. I surrendered the original Deed Number 86881 to the Bank. I attach the Loan Confirmation and the Consent to Pledge my property as collateral exhibits marked "TG1" and "TG2".
6. That within the agreed 12 months I finished repaying the loan without default and I expected the Bank to do its part in returning the original Title Deed to me.
7. I have on a number of occasions requested them to return the Original Title Deed or furnish me with good reasons regarding my Original Title Deed but the bank has negligently kept quiet.
8. As a business I receive small and big orders to supply safety and hardware supplies. I attach copies of some of the orders exhibits marked "TG3A", "TG3B", "TG3C" "TG3D", "TG3E", "TG3F" and "TG3G".
9. To satisfy the orders I need more money and this means obtaining bank loan. Banks require that one should have collateral for them to give the loan. And over the years I have been applying for a loan at various Banks but have failed to secure the loans because I don't have an original title deed to furnish as evidence of collateral. I attach letters regarding my loan applications to FDH Bank and CDH Bank exhibits marked "TG4A" and "TG4B".
10. I have approached several financial institutions for loan to finance my business but all of them want an original title deed as security. As a result of this I am failing to boost my business and it is incurring heavy financial losses.
11. The conduct of Opportunity Bank of not returning to me the Original title Deed has negatively affected my business as I cannot go to any financial institution to apply for a loan. This has resulted in failing to satisfy my clients' orders. I attach cancellation of some orders by clients exhibits marked "TG5A", "TG5B" and "TG5C".
12. I have also on a number of occasions engaged property evaluations to evaluate the property with an intention to apply for bank loans. I exhibit Property Valuation Report marked "TG6".
13. It is my strong belief that the continued holding of the Original Title Deed registered as Deed Number 6881 was oppressive, unreasonable and resulted in my financial losses. I deserve reasonable compensation for the financial losses I have incurred as a result of not utilizing my Original Title Deed with other banks, the orders that I failed to satisfy and profits I could have made from those transactions.
14. I also claim special damages for the replacement of the Original Title Deed detailed as follows:
 - i. Costs of advertising for the loss of the Title Deed in the Newspaper
MK150,000.00
 - ii. Cost of preparation of new title deed
MK50,000.00

Verification of Statements

I verily state that the facts in this witness statement are true to the best of my knowledge, information and belief.

Dated the 10th day of April 2017
(signed)
TIMEYO GONDWE

The Plaintiff also tendered the following evidence:

1. Loan Confirmation marked Exhibit P1
2. Consent to Pledge Property as Collateral marked Exhibit P2
3. Copies of some orders received by the Plaintiff marked Exhibit P3
4. Loan applications to FDH Bank and CDH Bank marked Exhibit P4
5. Cancellation of orders by clients marked Exhibit P5
6. Property Valuation Report marked Exhibit P6

In cross examination, the Plaintiff told the Court that he still hasn't received his original title deeds and he does not have the deed now. He confirmed that he is claiming reimbursement for costs incurred in advertising the lost title deed. The Plaintiff made enquiries at the Department of Lands to find out the procedure on lost title deeds and was advised to advertise this in the newspaper. He did not advertise for the lost deed. The Plaintiff is looking for damages to the tune of K150,000.00 as he sourced a quotation for the same.

The Plaintiff has a copy of his Business Registration Certificate but the bank has the original certificate. The copy was not in court on the day of hearing. The Bank also has the original Business Certificate. The Plaintiff had already given the certificate to the Bank and he didn't think the document was important. The loan was obtained in the business name of Divine Safety Specialists and not Timeyo Gondwe. The agreement signed made preference to the plaintiff's business.

As of 2015, the Plaintiff's property was valued at K11 million. The loan of K2 million was obtained in 2013 and it was repaid over a period of 12 months. The K2 million was used for some orders that the Plaintiff had and some of it was used to buy stock for his shop. The K2 million was used on the Plaintiff's business.

The Plaintiff is registered with the Malawi Revenue Authority and he pays tax. He pays VAT and duty at the boarder. The Plaintiff does not pay income tax as his business is experiencing losses so he cannot pay income tax. The business was registered in either 2006 or 2004. He has been paying income tax since registration. He last paid income tax in 2013 but could not remember how much he paid as the documents were at his office. The Plaintiff could not remember how much profit he had made as the documents were also at the office. The Plaintiff could remember that it was over 150% profit and the Bank took 50% of that money. The Plaintiff keeps a profit and loss account for his business. He didn't find it relevant to bring it before the court. The Plaintiff has been taking loans from banks but has only made losses now. He has also been paying taxes but has been making losses since his documents were held by OBM.

The Plaintiff confirmed that he had not paid any money for advertisement costs, that he has not indicated a profit or loss account in his witness statement although he would be able to tell the Court the profits and losses since it was in his witness statement. The Plaintiff lost his opportunity to use the title deed as collateral. He would like the court to compensate him for the lost use of the title deed. There are other uses for a title deed but the Plaintiff was not aware how else he would have put the title deed to use.

The Plaintiff attached documents of orders received from his clients. He averred that losses cannot be made before a client makes an order since the order is based on a quotation that calculates the profit. The Plaintiff did not present the quotations submitted for the corresponding orders. It cannot be told what profits would have been made in the absence of

the quotations nor did the Plaintiff demonstrate how much he could have made. The Plaintiff agreed that one cannot tell how much profit could have been made based on the documents submitted.

In re-examination, the Plaintiff told court that he pays tax. He confirmed that there was no relationship between profits and losses and the orders that he failed to provide. The Plaintiff would have obtained the loans from CDH and FDH Bank had the title deed been available.

SUBMISSIONS BY COUNSEL FOR THE PLAINTIFF

Counsel for the Plaintiff did not file any written submissions.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANT

Counsel for the Defendant submitted as follows:

“The burden of proving the losses and the extent of the losses suffered by the Plaintiff was on the Plaintiff.

The Plaintiff failed to give evidence showing any or the extent of loss of business profits that he incurred.

Although the plaintiff proved loss of general use of the title deeds, he failed to show the extent of such loss.

In this scenario, the plaintiff should have been awarded interest. However, the Plaintiff did not provide the court with evidence showing the value of the title deeds which would have enabled the court to make an award for interest.

The law is that where the fact of a loss is proved but the necessary evidence as to its amount is not given, nominal damages are awarded.

In Beaumont v Greathead (1846) 2 CB 494 at 499, it was stated that “Nominal Damages means a sum of money that may be spoken of, but that has no existence in point of quantity”. In the UK, the norm is to award five pounds as nominal damages – See Brandeis Goldschmidt & Co v Western Transport [1981] QB 864; Surrey County Council v Bredero Homes [1993] 1 ELR 1361.

It is our submission that the plaintiff be awarded nominal damages in the region of K500,000.00.

On the claim for special damages, the law is settled that these must be strictly proved by cogent evidence. During cross examination, the plaintiff conceded that he did not pay any costs for advertisement and preparation of a new deed. Indeed the plaintiff did not produce any proof of payment for advertisement and preparation of a new deed. We therefore submit that the plaintiff should not be awarded these special damages as the same have not been strictly proved with cogent evidence.”

THE LAW ON ASSESSMENT OF DAMAGES

The High Court in ***Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd*** [1992] 15 MLR 370 (HC) set the basis for assessment of damages:

‘Assessment of damages.....presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.’

The rule is that prior to assessment, the injured party has provided proof of damage sustained – ***Yanu-Yanu Co Ltd v Mbewe*** (SCA) 11 MLR 405. Even in the face of difficulties in assessing

damages, the Plaintiff is not disentitled to compensation – **Mkumuka v Mphande** (HC) 7 MLR 425.

The cardinal principle in awarding damages is ‘*restitutio in integrum*’ which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – **Halsbury’s Laws of England** 3rd Ed. Vol. II p.233 para 400.

This principle was further enunciated in **Livingstone v Raywards Coal Co** (1880) 5 App Cas 25 at 39, where Lord Blackburn said:

‘...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation.’

The law distinguishes general damages and special damages as follows – general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - **Stros Bucks Aktie Bolag v Hutchinson** (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – **McGregor on Damages** p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - **Govati v Manica Freight Services (Mal) Limited** [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – **Wood Industries Corporation Ltd v Malawi Railways Ltd** [1991] 14 MLR 516.

Although perfect compensation is impossible, what the plaintiff should get is fair and adequate compensation - **British Commission v Gourley** (1956) AC 185. Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in **West v Shepherd** (1964) AC 326 at 346 where he states: ‘*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*’

The court bears in mind the sentiments laid out in **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported):

‘At times, the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.’

COMPENSATION

The Plaintiff was denied use of his original Title Deed by the Defendant and was unable to apply for loans and service orders from clients due to the wrongful and unlawful holding of the title deed by the Defendant.

Loss of Use

The law on damages for use of a chattel is that general damages are recoverable for loss of use of a non-profit earning chattel: see the case of **The Grata Holme** (1877) AC 596; see also **McGregor on Damages** 15th Edition at p789, para 1271 and 1272. Loss of profit is also recoverable on the loss of use of a profit earning chattel where the plaintiff processes such a loss: see **DN Zulu v Right Price Wholesalers, Charter Insurance Company** High Court Civil Cause Number 1260 of 2001. General damages by their nature are incapable of arithmetic calculation and as a result the court exercises its discretion in awarding them since such damage is known to be likely. The defendant needs no notice of it and there is no need to plead it specifically – **Tsamwa v Imprea Inc Fortunato SPA** Civil Cause Number 370 of 1998 and **OC Yiannakis v Adamson Dumba, Registered Trustees of Kaphuka Private Secondary School and NICO General Insurance Company Limited** Civil Cause Number 1680 of 2003.

In the case of **Chinema v World Vision International** Civil Cause Number 1097 of 1991 the Judge noted: *"It is conceded that the Courts are rather conservative in awarding damages for loss of use and the cases do not show a criterion for awarding damages for loss of use... I have pointed out that awards for loss of use are not consistent and they depend on the circumstances of each case and the money depreciates in value all the time."*

In determining natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer, see **McGregor on Damages** at page 23 para 1036. The compensatory principle is further qualified by other factors such as the principle of remoteness of damage and the duty on the part of the plaintiff to take the reasonable steps to mitigate the loss; see **OC Yiannakis v Adamson Dumba, Registered Trustees of Kaphuka Private Secondary School and NICO General Insurance Company Limited** Civil Cause Number 1680 of 2003.

In the present matter, the Plaintiff avers that the wrongful and unlawful holding of the title deeds by the Defendant disadvantaged him in obtaining further loans to service orders from his clients. The Plaintiff further tendered seven (7) Local Purchase Orders which he alleges he failed to meet because he did not have access to a loan. The Local Purchase Orders range in prices from the lowest amounting to MK1,532,000.00 (one million five hundred and thirty thousand kwacha) to MK31,550,000.00 (thirty one million five hundred and fifty kwacha). This evidence aimed to show us the value ranges within which the Plaintiff trades and why he needed the title deeds from the defendant to inject capital into his business to meet these orders.

The Plaintiff further tendered a Property Valuation Report (marked Exhibit P6) for the property whose title deeds are being held by the bank. The Property Valuation Report bears the opinion that *"the leasehold interest in the subject property as at 17th January 2015 is in the sum of K11,000,000.00 (eleven million kwacha)."* Given the devaluation of the Kwacha since January 2015, the property must have risen in value by now.

In considering the appropriate compensation to award the Plaintiff, this court has the aforementioned considerations in mind. The Plaintiff alleges that the holding of the title deeds

has resulted in lost orders and lost profits to his business. Looking at the value of property, K11, 000,000.00, or we'll put it at K15, 000,000.00 for arguments sake, the Plaintiff would have only been able to meet 3 out of the 7 orders, valued at 1 million, 7 million and 9 million, even with a loan obtained against the property. Banks will give a loan to a person that will be a fraction of the value of the collateral. To say that the Plaintiff lost all this business solely because of the unlawful holding of the title deeds would be unfair to the Defendant. Even if the Plaintiff had had the title deeds the value of the property would not have allowed him to meet the demand as it was well out of his financial reach anyway.

With that being said, the values of the property and the Local Purchase Orders have given great insight to the court towards a range of compensation that would adequately compensate the Plaintiff. For these reasons, this court believes the sum of **MK3,000,000.00** will adequately compensate the Plaintiff.

Special Damages

A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. See also ***Govati v Manica Freight Services (Mal) Limited*** [1993] 16(2) MLR 521 (HC).

The Plaintiff herein claims MK150,000.00 being advertisement costs for advertising the lost deed and MK50,000.00 being the costs of replacement of the deed. The evidence stated in cross examination that he had not actually placed an advert and was waiting for the compensation of the court to do so. The Plaintiff averred that he had received a quotation from the newspaper which quotation was not made available to the court. This court is not sure where the Plaintiff got the figures. It is clear that the Plaintiff has no supporting evidence for his claims and has not led any evidence to substantiate the amounts nor the replacement procedure.

This court will not make any award under this head.

DISPOSAL

The Plaintiff is therefore awarded MK3,000,000.00 being damages loss use and nothing for special damages. The Plaintiff's total award is MK3,000,000.00.

Either party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 22nd day of December 2017 at Chichiri, Blantyre



CM Mandala

ASSISTANT REGISTRAR