



IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

CIVIL CASE NO. 1341 OF 2006

BETWEEN

MEGABITES CATERERS..... CLAIMANT

AND

MALAWI TELECOMMUNICATIONS LIMITED-(INSTITUTE OF  
TECHNOLOGY AND MANAGEMENT.....DEFENDANT

CORAM: Hon Justice Nriwa Judge

Claimant present and represented by Mr Chagwamnjira of counsel

Defendant not present and not represented

Clerk Ms Mtegha

### JUDGMENT

The claimant and the defendant entered into a three-year agreement for the claimant to provide the defendant with catering services. The defendant terminated the contract after a shorter period. The claimant commenced the matter against the defendant. During mediation, the parties agreed on some matters but failed to agree on issues of loss of business and interest on a late payment that the defendant made to the claimant.

On loss of business, the claimant's claim is that due to the abrupt termination of the contract, they suffered loss. They thus want to be compensated for the loss.

On the issue of interest, the claimant argued that they sent invoices to the defendant for meals provided from 15<sup>th</sup> July, 2005 to 19<sup>th</sup> July 2006. This amounted to K584,136.65. The defendant, according to the claimant, paid the sum eleven months later on 1<sup>st</sup> November, 2006. The claimant claimed interest on the sum and the defendant refused to pay. The claimant therefore claims the interest on the sum.

The matter came before me initially on 28<sup>th</sup> May, 2018 for a scheduling conference. I ordered the parties to disclose documents in the matter. I set down the hearing of the matter for 27<sup>th</sup> June 2018.

The claimant filed a witness statement and skeleton arguments. The defendant did not. On the date of hearing, counsel for the defendant wrote a letter that he had another matter in the Commercial Division. Further to that, counsel stated that he was not able to contact the witnesses, namely Mrs Nkungula and Mr Chibwana. Counsel for the claimant, Mr Chagwamnjira told the court that he gave Mr Kusiwa, counsel for the defendant, the contacts of Mrs Nkungula. He said he knew that Mrs Nkungula was working for Reserve Bank of Malawi.

I set down the matter for 15<sup>th</sup> August and ordered the defendants to file witness statement within fourteen days from then. On the date of hearing, the defendant did not attend the hearing. Again, they did not file any document in relation to the trial.

I have outlined the circumstances in which the case has proceeded in my court to demonstrate that the defendant has been in default of the directions of the Court. In essence, the defendant took no further steps to defend the action. Further, the claimant gave evidence that has not been challenged.

The issue of loss business is not in dispute. I am convinced that, as a result of the defendant's breach of contract, the claimant lost business. Therefore, the defendant is liable to pay the claimant damages for loss of business. The matter will have to proceed before the Registrar to assess compensation for the loss.

On interest, the claimant claimed to be paid interest over and above the lending rate at the bank up to the date of the judgment.

Section 11(a)(v) of the Courts Act provides that without prejudice to any other written law the High Court shall have jurisdiction to direct interest to be paid on debts.

The jurisdiction to award interest is a discretionary one -*Lameck Moya and others v Privatisation Commission* [2006] MLR 236 (HC). The Court reserves jurisdiction whether to award interest or not.



Decisions of the court hardly show how the Courts will have to exercise the discretion in awarding interest on judgments. This is also the case with English cases.

In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, Lord Goff of Chieveley, said at page 684:

“One would expect to find, in any developed system of law, a comprehensive and reasonably simple set of principles by virtue of which the courts have power to award interest... Sadly, however, that is not the position in English law.”

Back in history in English legal system, in *Page v Newman* (1829) 9 B&C 378, Lord Tenterden MR outlined the common law principle for award of interest:

“the long-established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.”

From that, English legislature enacted laws on the subject of award of interest by Courts. (these include STATUTE OF FRAUDS (popularly known as Lord Tenterden’s Act, due to its reaction to Lord Tenterden’s judgment) and ..... Law Reform (Miscellaneous Provisions) Act 1934. The power also has had some genesis in the Courts’ exercise of an equitable jurisdiction. For example, the Admiralty Court awarded simple interest as a matter of course on damages: *The Northumbria* (1869) LR 3 A&E 6.

Another decision on the point is *London, Chatham and Dover Railway Company v South Eastern Railway Company* [1893] AC 429. The House of Lords held that at common law, in the absence of any agreement or statutory provision for payment of interest, a court had no power to award interest by way of general damages for late payment of a debt. Under statute, simple interest was recoverable on judgment debts, but only as a matter of discretion. Section 28 of Lord Tenterden’s Act was replaced by s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which allowed a court trying any claim for “the recovery of any debt or damages” to order that there be included in the judgment debt interest from the date that the cause of action arose to the date of judgment,

“Any debt” covered liquidated or unliquidated sums recoverable in contract (express or implied) or under statute. However, interest could not be recovered on any debt paid before judgment was obtained or before proceedings were issued.

Under the general equitable jurisdiction, the Chancery courts awarded simple interest as an auxiliary relief in respect of equitable remedies, such as specific performance, rescission and taking of an account. In cases of fraud, compound interest is recoverable in equity where money has been obtained and retained by fraud.

See *Black v Davies* [2005] EWCA Civ 531, where the Court said:

“in other words, where the fraudster has in hand a fund which he has, or is deemed to have, made use of for his own benefit”

Compound interest was recoverable by agreement and by custom and practice or trade usage e.g. a bank’s entitlement to compound interest: *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 AC 637.

In England, however, the scope has expanded for cases for award of interest. In *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, though in mere passing (*obiter dicta*), the Court of Appeal said that interest could be recovered as special damages provided this was a foreseeable loss within the contemplation of the parties when the contract was made.

In *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34 [2008] 1 AC 561 Lord Nicholls summarised the common law position that: a claimant can plead and prove his actual interest losses<sup>1</sup> subject to remoteness, mitigation of loss and so on. This entails, for example, the cost of borrowing or the lost opportunity to invest the money. In other words, a claimant cannot make an unparticularised claim for interest as general damages. Lord Nicholls went on to state that the statutory discretion to award simple interest is an additional power that does not displace the common law remedy.

In short, a claimant does not have an automatic right to interest on debts. The Court has to exercise discretion informed by the claim. There has to be the basis<sup>2</sup>, and evidence supporting the basis, to award the interest.

That position has also been taken by the Courts in Malawi. In *Kamchacha v Kara* [1993] 16(2) MLR 537 (HC), though a decision by a Registrar, the Court said:

I have reservations on the claim for interest.

Not surprisingly, the witness led no evidence on the claim for interest. What is not clear is whether the claim for interest is based on a contract between the parties or based on a statutory provision. The plaintiff is entitled to

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<sup>1</sup> including compound interest, caused by late payment of debt, breach of contract or in tort as special damages

<sup>2</sup> Contractual or otherwise



interest on the judgment under section 17 of the Judgments Act 1838, United Kingdom. This is a statute of general application before 1902. It applies to Malawi. The plaintiff, however, claims interest at five % up to the time of the judgment. There is no evidence before me of an agreement. Of course, section 11(a)(ii) of the Courts Act gives power to the High Court to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties or on sums found due and unpaid by receivers or other persons liable to account to the High Court. The application, however, will have to be in form of a direction rather than a right.

In *Simiyoni v Kanyatula* [1999] MLR 382 (MSC), the Supreme Court had this to say:

As was the case in the court below, we decline to award damages and interest thereon, but award interest of 5% per annum on the amount of K226 061-43 calculated from the date when the money was paid to Stansfield Motors Ltd up to the date when the money was paid into court. We also award all the accrued interest which had been earned since then up to the date of payment. The 5% interest rate is usually applied for judgment debts, however, this is a simple debt and we have used our discretion in applying the 5% statutory interest rate, otherwise the appellant would not have earned any interest, since contractual interest rates must be pleaded: see Practice Direction issued by the Queen's Bench Division [1982] 3 All ER 1151, which states:

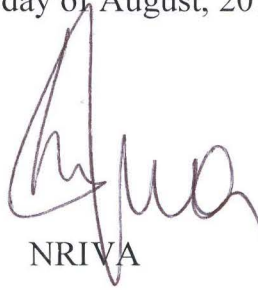
“Contractual interest

The statement of claim must give sufficient particulars of the contract relied on, and, in particular, must show:

- (i) the date from which interest is payable,
- (ii) the rate of interest fixed by the contract, (iii) the amount of interest due at the issue of the writ.”

In this matter, I do not find the basis for award of interest from when the debt was paid up until this date of judgment. One might ask whether the claimant has suffered that loss all these years. The other question is what the claimant did to mitigate the loss. Cognisant though that debts ought to be paid on time, in exercising my discretion, I order that the interest that the defendant must pay the claimant should be five per centum per month for twenty months. I believe strongly that the claimant had to mitigate the loss by that time. After all, the defendant paid the debt after eleven months.

DELIVERED at Blantyre the 20<sup>th</sup> day of August, 2018.

A handwritten signature in dark ink, appearing to read 'N. Riva', is written over the printed name.

NRIVA  
JUDGE