



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

Civil Cause Number 355 of 2015

BETWEEN:

WILLARD DYSON CHIVIYA

t/a ASCET CONSTRUCTION.....CLAIMANT

AND

THE ATTORNEY GENERAL.....DEFENDANT

CORAM:	C MANDALA:	ASSISTANT REGISTRAR
	Claimant:	Self-represented
	Defendant:	Absent
	C Zude:	Court Clerk

ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a judgment delivered on 17th December 2019 by the Honorable Justice Nyirenda. Judgment was entered in favour of the claimant in the sum of K2,343,830.80 plus interest of 5% per annum to be calculated from 18th April 2012. This court is called upon to determine the damages payable to the Claimant for loss of business and special damages. The Honorable Judge already made an order on payment of the contract value, interest and costs were awarded to the Claimant.

The Claimant's action arose from a transaction between his construction firm, Ascet Construction, and the Lilongwe District Council. The Claimant was awarded a contract by the Lilongwe District Council to carry out maintenance works on house number DC 1 located at Falls Estate in the city of Lilongwe. In breach of that contract, the Lilongwe District Council neglected to settle the amount of K2,343,830.80 due to the Claimant.

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 Claimant 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 they were before the injury was sustained – *Halsbury's Laws of England* 3rd Ed. Vol. II p.233 para 400. *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25 at 39 contains a statement by Lord Blackburn that captures the state of the law. He 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 they would have been in had they not sustained the wrong for which they are now getting compensation or reparation.'

Although perfect compensation is impossible, the Claimant should get fair and adequate compensation - **British Commission v Gourley** (1956) AC 185. It is difficult to assess damages involving monetary loss, so courts award conventional figures guided by awards made in similar cases while taking into account the money value. Lord Morris buttresses this contention in **West v Shepherd** (1964) AC 326 at 346: *'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 is further guided by **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported). It says: *'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

Loss of Income from Breach of Contract and Interest

The Honorable Judge made an order on payment of the contract value, and interest on the sum. Judgment was entered in favour of the claimant to the tune of K2,343,830.80 plus interest of 5% per annum to be calculated from 18th April 2012.

The Claimant's submissions contain calculations on the interest. The relevant parts of the submissions state (all emphasis made by the Claimant):

"45. Damages. As ASCET Construction, I refer to sub-section 43.1, in conjunction with special conditions of Contract (SCC) and I reproduce in part, regarding loss of business

".....interest shall be calculated from the date by which payment is made AT THE PREVAILING INTEREST FOR COMMERCIAL BORROWING FOR EACH OF THE CURRENCIES IN WHICH PAYMENTS ARE MADE."

The Claimant refers to sub-clause 23.4 on General Payment Procedure regarding delay in payment which I reproduce below:

"If the procuring entity has delayed payments beyond fifteen (15) days after the due date stated in the SCC, interest shall be paid to the Bidder for each day of delay at the rates stated in SCC" (Exhibit WDC 32).

SCC mentioned above refers to sub-clause 43.1 as afore-said above, which the Claimant, prays to your Lordship Honourable Registrar that sub Clause 43.1 be mandatory as per Act 27 of 2017 of Public Procurement and Disposal of Assets sub-clause 45(2) be uphold.

While I appreciate the award of 5% per centum per annum, I humbly pray that the Honourable Registrar to consider Act Number 27 of 2017 of Public Procurement and Disposal of Assets, sub-section 45(2) USE OF STANDARD BIDDING DOCUMENTS "The use of such standard Bidding Documents shall be mandatory on all procuring and disposing entities" (EXHIBIT WDC 30).

Bidding documents which are correlative and complementary to Sub Clause 45.2 of Act 27 of 2017, and GCC Sub Clause 4.1 (EXHIBIT WDC 31) on Law that specifies on Sub Clause 43.1.

The Special Conditions of Contract (SCC) read in conjunction with the General Conditions of Contract (GCC) derived from Procurement and Disposal Assets Act Number 27 of 2017 are part of contract

documents which are mandatory. These are to be correlative, complementary, and mutually explanatory as stated in Sub-Section 3.2 of GCC. Therefore, I pray to your Lordship the Learned Registrar if Sub-Clause 43.1 could be observed and be upheld, particularly on commercial banks prevailing rate. I to the case of Sydney Chikhwaya t/a Sherks Engineering & Welding Contractors vs United General Insurance Company Limited, Civil Cause No. 237 of 2012 which also referred to Commercial Case Number 108 of 2009 in which the Court said:

“In commercial matters the courts award interest at the commercial rate. This commercial rate is the rate at which the plaintiff would have had to borrow money in place of the money which had been wrongly withheld from him by the defendant. This is usually the minimum lending rate as fixed by the central bank plus a markup. It has come to be accepted that in Malawi the mark up is generally 4%. In the United Kingdom the mark up is 1% Tate & Lyle Food Distribution Limited vs. Greater London Council and another [1981] 3 All ER 716.”

Please note that the SCC read with Sub-Clause does not state of minimum but prevailing rate of borrowing for each day of delay (EXHIBIT WDC32).

I further refer to Special Conditions of Contract (SCC) Sub Clause 2.3 (4) (5) read in conjunction with Sub Clause 43.1 of General Conditions of Contract (GCC), particularly on **the prevailing rate of interest for commercial borrowing.**

If the Claimant borrows money today the 21st January, 2020 from any commercial bank, **prevailing rate of interest to is 24.1 per annum.** It is my prayer the same is applicable on Sub Section 43.1 afore mentioned. Therefore 5% per centum per annum awarded because of the damage on house gate thus prevailing rate of interest of **24.1% make 29.1%.**

45.1 Principal: K2, 343, 830.80

45.2 Rate: 5% above lending rate = 24.1% + 5% = 29.1%

45.3 Rule: $P (1 + r/100)^n$

45.3.1 So = $1 + r/100$

45.3.1.1 = $(1.291)^7$

45.3.1.2 = 7.7163

45.4 Hence K2, 343, 830.80 x 7.7163

45.4.1.1 = K18,085,701.60 (as per SCC 43.1)”

It is unclear where the formula $P (1 + r/100)^n$ was taken and what it means. The Claimant also makes reference to the **Public Procurement and Disposal of Assets Act (2017)** which was not in force at the time the contract was made. The law does not allow for retrospective application of laws so the Claimant cannot benefit from its provisions.

In light of which, this Court went back to the specific wording of the pleadings and the words of the judgment. The pleadings state that the Claimant ought to be awarded ‘*interests accrued on the sum of K2,343,830.80 owed by Lilongwe District Council under the agreement.*’ In the judgment, the Court awards the Claimant 5% interest on the owed sum from April 2012. The Claimant’s pleadings make no mention of whether the interest will be compound interest or simple interest nor do the pleadings state that interest will be above the base bank lending rate. In light of which, the interest awarded by the Judge conforms with section 65 of the **Courts Act** which states:

'Every judgment in civil proceedings shall carry interest at the rate of five per centum per annum or such other rate as may be prescribed.'

Therefore, the interest that the Claimant is entitled to is:

5% of K2,343,830.80 = K117,191.54 per annum

K937,532.32 for 8 years plus K19,531.92 for two months

Total interest – K957,064.24

This court hereby awards K957,064.24 as interest on the contract sum.

Loss of Business

Where loss of business is pleaded as general damages; the principles attached to awards for general damages ought to apply. General damages need not be specifically pleaded nor proved and are the direct, natural or probable consequence of the action complained of. In determining the natural consequences, the court considers whether the loss is one which any other claimant in a like situation will suffer – **McGregor on Damages** p23 para 1-036. 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.

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.

On the other hand, if the Claimant is claiming loss of business as special damages then these damages cannot be inferred by the law from the nature of the course - *Stros Bucks Aktie Bolag v Hutchinson* (1905) AC 515. 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 Claimant who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss they allege to have incurred. Where documents filed by the Claimant fail to meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516. Of course, special damages may be allowed to be proved even if they were not specifically pleaded, provided that the existence of such a claim is clear from the pleadings (**Longdon-Griffiths –v- Smith [1950] All E.R. 662**).

In determining whether a claim for loss of business is intended to be included under special damages or not; the Claimant must have intended that the loss of business claim be regarded as special damages. The Claimant shows this intention through the pleadings. In *Patrick Murama T/A Zikomo Ambuye Yesu Transport v Elenino Mulongoti and Citizen Insurance Company Limited* MSCA Civil Appeal Number 33 of 2012 (2014 decision), Counsel for the Appellant asserted that the claim for loss of business was included under general damages. In her submissions to the lower court, she had also asserted that the evidence exhibited was there in order to prove the claim for loss of business under the head of special damages. The Supreme Court agreed with the Assistant Registrar's refusal to award damages under that head because they were not specifically pleaded as special damages even though the evidence that was exhibited sought to prove the special damages. The Supreme Court

stated: “We find that since Appellant intended that loss of business profits be regarded as special damages claim, which of course, required specific pleading and strict proof, it is unfair, in our view, to fault the court below that it ought to have considered a reasonable award of damages in the circumstances.”

Therefore, in order to successfully award damages of loss of business, a court should be convinced that the Claimant must have specifically pleaded for damages for loss of business, must have strictly proven that business profits were indeed lost and the Claimant must have intended that the loss of business be claimed as special damages. In this case, the Claimant in this case, specifically pleaded for an award for loss of business to be made by the Court.

The Claimant made the following submissions to show that business profits were lost:

“46. LOSS OF BUSINESS AS CONTRACTOR: (as in Knight Frank vs. Blantyre Synod MSCA CIVIL APPEAL NO. 38 OF 2000, where calculation of $60 \times 4 \times 2,000 \times 3 = K1, 440, 000.00$ was made

46.1 $K2, 343, 830.80$ was achieved 3 weeks, in 7 years it would be:

46.2 $K2, 343, 830.80 \times 7 \times 52/3 = K284, 830, 803. 00$

Plus 9 month: May 2019 to January 2020 = 9×30 days = 270 days divided by 7 days = 38.57 weeks.

Divided by period of achieving $K2,343,830.80$ which is 3 = $38.57/3 = 12.85 \times 2,343,830.80 = K30,134,967.42$ Plus $K284,830,803.00$ (for seven years) + $K32, 813, 631.20$ (for nine months).

Total for seven years 9 months is $K314,965,770.42$ being loss of business to date for ASCET Construction”

The total sum claimed by the Claimant is $K314,965,770.42$ for loss of business to ASCET Construction. The Claimant based his calculations on the matter of ***Knight Frank v Blantyre Synod*** - MSCA Civil Appeal Number 38 of 2000. In that matter, the calculations were based on very specific figures involving classroom blocks and the number of students contained in every classroom. The Supreme Court stated thus:

“We now turn to general damages. The learned Registrar awarded the respondent $K1,440,000.00$ for loss of business. He found that the respondent would have started with four classes of 60 pupils each class and that each pupil would have paid fees in the sum of $K2,000.00$ per each of the three terms of the first year. By simple multiplication, $60 \times 4 \times 2000 \times 3 = 1,440,000.00$, hence the $K1,440,000.00$ awarded. The appellants contend that the finding by the learned Registrar, that the respondent would have enrolled 60 pupils per class, was against the weight of the evidence adduced. Counsel for the appellants submitted that going by the respondent’s own evidence, each class would have taken not more than 15 pupils. The respondent’s letter, which was produced in evidence at the assessment as Exhibit P4, states in unequivocal terms that the building was “too small” and would not “take more than 15 pupils per class”. In reply, Counsel for the respondent stated that the truth of the matter was that the rooms were big enough to accommodate more than 60 pupils per class. ... In the final analysis, we find that there is merit in the appellants’ submission that the finding by the learned Registrar, that the premises were able to accommodate 60 pupils per classroom, was not borne out by the evidence. We agree with the submission that the evidence instead established that the premises could accommodate 15 pupils per classroom. Using this figure, $15 \times 4 \times 2000 \times 3$, gives a figure of $360,000.00$, which translates to $K360,000.00$. The appellants’ appeal on this aspect therefore succeeds and the learned Registrar’s award under this head is set aside and reduced to the extent of this new figure of $K360,000.00$.”

The Claimant’s submission is a basic extrapolation of the Supreme Court’s calculations and it doesn’t fit these circumstances. The Claimant further bases his calculations on the contract sum which he says he made within 3 weeks. The Claimant did not provide any evidence to show that his business made this much money every three weeks. Additionally, if his business was capable of this, it is unlikely that the Claimant’s business would have been making the contract sum every three weeks for the past 8 (eight) years and 2 (two) months.

In light of this, this Court will not make an award of general damages as the Claimant's evidence was not instructive to the court. As per *Patrick Murama T/A Zikomo Ambuye Yesu Transport v Elenino Mulongoti and Citizen Insurance Company Limited*, the Claimant ought to have shown that business profits were indeed lost but he failed to discharge this burden. For this reason, this court will not award any sum under this head.

Special Damages

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.

The Claimant's witness statement/submission on special damages is couched as follows:

“47. Special Damages: Lilongwe District Council failed to honour promise made to OIBM. We all know how or heard how the bank operated. Council promised to pay me by mid-December 2013 so that I could pay OIBM in time. Council never paid me until a small payment of K311,000 for motorcycles was made six months later. That was torturous when I was forced to pay OIBM after mid-December 2013. Assets for the garage and Fresh Foods Enterprises were sold hurriedly at very cheap price as I was given just a day to pay. Nobody could come selling an item at half shop price but lowering to quarter or even below. Therefore, I **claim Special damages** for the same as follows:

47.1.1 ASCET (Garage) made K5,115,840.65 per 5 months on average. As per sales summary table EXHIBIT WDC 40 (invoices dates are supported by date of collecting vehicle from workshops in delivery book. Average per month was $K5,115,840.65/5 = K1,051,721.03$ per month. For 73 months (December 2013 to January 2020) = $K1,051,721.03 \times 73 = K76,775,635.19$

47.1.2 December 2013 to January 2020 = 73 months

47.1.3 73 months $K1,051,721.03 = K76,775,635.19$. Calculation based on the case authority of Knight Frank vs Blantyre Synod.

47.1.4 ASCET Automotive lost K76,775,635.19 to date. Please refer to EXHIBIT WDC 17 for workshop sales summary for a period of five (5) months, as per above referred case of Knight Frank vs Blantyre Synod

47.1.5 K65, 700,000.00 for Fresh Foods Enterprises.

47.2 Letter marked CM2 that I did not bring documentation to Lilongwe District Council can be rebutted by EXHIBIT WDC9, letter on which invoice C001 for K2,343,830.80 is indicated, the letter that was endorsed by District Commissioner Mr Charles Kalemba.

48 Please note that cash generated from these two firm registered in my name WILLARD Dyson Chiviya was used to fund repairs carried out to House DC1.”

The Claimant refers to exhibits WDC 40 and WDC 17. The assessment bundle does not contain the exhibit WDC 17. While, WDC 40 is an invoice from ASCET Automotive Services Centre & Equipment Trading dated 30/05/2014 for major repairs including engine overhaul of a Yamaha mode. The Grand Total is K184,560.00. It is not a sales summary as stated in the witness statement. Further, the court has stated its reservations with the Claimant's calculations based on the Knight Frank Case. They are not the best reference due to the differences in context. It is also unclear which particular calculations he refers to in this case, this court cannot infer.

The Claimant's witness statement and assessment bundle are extremely difficult to follow, some exhibits are numbered while others are not and most have his commentary, tippex and handwritten changes which make it difficult to ascertain the credibility of the documents. It is unfortunate that the Claimant chose to proceed without legal representation as these might have been errors that would have been avoided. Nonetheless, every litigant may represent themselves so the Claimant will not be penalised for doing so.

In light of the foregoing, the Claimant has failed to prove the special damages as claimed and this court will not award any sum under this head.

DISPOSAL

The Claimant is therefore awarded the contract sum of MK2,343,830.80 as claimed, the sum of MK957,064.24 being interest on the contract sum from April 2012 to date, MK0 for loss of business, and MK0 as special damages.

Costs will be assessed by the Registrar.

Leave to appeal is granted. Either party is at liberty to appeal to the Supreme Court of Appeal within 30 days.

Ordered in Chambers on the 3rd day of July 2020 at the High Court, Lilongwe District Registry.



C Mandala

ASSISTANT REGISTRAR