IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 393 OF 2015

BETWEEN:

PD MADULA t/a MADULA GENERAL SUPPLIERS CLAIMANT

AND

ROADS AUTHORITY 1st DEFENDANT

SOUTHERN REGION WATERBOARD 2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Makwinja, Counsel for the Claimant
Sitima, Counsel for the 1st Defendant
Machika, Counsel for the 2nd Defendant
Mrs Mpasu, Official Court Interpreter

JUDGMENT

1. This is this court's judgment following a trial of this matter on the claimant's claim for damages and costs following the closure of the claimant's pay in toilet opposite Zomba Central Hospital main gate. The defendants oppose the claim. All the parties paraded witnesses.
2. The claimant is a businessman. The defendants are statutory corporations responsible for roads construction and water supply respectively.
3. The claimant claims that he was running a pay in toilet business opposite Zomba Central Hospital main gate and that the toilet stopped functioning early

July 2014 when the defendants' agents or servants removed the pipes supplying water to the said toilet and also damaged part of the toilet building and septic tank whilst in the course of their duty along the Zomba-Blantyre Road.

4. The claimant further claimed that the watchman's house which was close to the toilet and six toilet pans were vandalized as the claimant could not continue paying the watchman since the toilet was closed and no revenue was being collected.
5. He claimed that by reason of the foregoing his business has seriously been damaged resulting in considerable loss of revenue in consequence of which the claimant has sustained mental anguish and anxiety and has suffered loss and damage.
6. The claimant indicated the particulars of loss, namely, loss of business from 2014 to date, mental suffering due to the closure of his business, repairs to the watchman's house, repairs to the damaged toilet and septic tank and replacement of six toilet pans. And that all these are subject to assessment. He also claims costs of this action.
7. The defendants opposed the claimant's claim. The 1st defendant stated in its defence, which was filed before the 2nd defendant was joined as a party, that it denies that the claimant is a business t/a as claimed. It stated that its correct name is Roads Authority and not National Roads Authority as indicated by the claimant on his claim.
8. The 1st defendant then noted the claimant's claim against it and outlined the procedure that it follows on road construction. It stated that standard procedure where road construction would disrupt supply of utilities is to consult the service provider on whether the road reserve is free from their services. And if the road reserve is not free of their services, the service provider presents a quotation to the 1st defendant and the 1st defendant pays the service provider to relocate the utility away from the road service.
9. It stated that in the present matter it followed the standard procedure and paid the Southern Region Water Board to relocate the water supply pipes away from the road reserve and to repair any pipes damaged as a result of the road construction.
10. It then asserted that as a result of following of the outlined procedure, issues to do with damaged water supply pipes and water connections became the

responsibility of the Southern Region Water Board and it was the duty of the Southern Region Water Board to reconnect water to the claimant after the disruption in supply occasioned by the road construction.

11. The 1st defendant then asserted that the claimant has directed his claim to it being the wrong party and it therefore denied his claim for damages.
12. On its part, the 2nd defendant asserted in its own defence, that it is not true that the claimant's toilet stopped functioning in 2014 due to removal of pipes supplying water to the said toilet. It also denied the claimant's claim that it damaged the toilet building and septic tank as it installed its pipes more than two metres away from the toilet.
13. The 2nd defendant asserted that when it was moving water supply pipes it did so on the advice of the 1st defendant and that the toilet was left intact. It further asserted that it did not move the water supply pipes in 2014 as claimed by the claimant but rather did so earlier in 2012. It added that by the time it moved the water supply pipes, the water supply to the toilet had already been disconnected in 2011 due to unpaid bills.
14. It then asserted that by the time the water supply pipes were relocated the toilet building had been marked for demolition because it was standing within the road reserve. And it denied the claim for loss and damage indicated by the claimant.
15. Each of the parties paraded a single witness when this Court went and heard the evidence at the site of the toilet in issue.
16. The facts as gathered from the evidence of the three witnesses in this matter are that the claimant was allowed to run a business of a pay in toilet herein by the Zomba City Assembly. The claimant was to renovate the City Assembly's dilapidated toilet and his repair costs were to be off-set against rentals that he was meant to pay to the Assembly.
17. The claimant renovated the dilapidated toilet and run a pay in toilet business there. Curiously, he never paid any rentals to the Zomba City Assembly but paid a daily fee of K20.00 to the Assembly.
18. There is disagreement amongst the parties as to when the road construction works on the Zomba-Blantyre road actually began and affected the claimant's business. However, what is clear is that in 2013 the claimant went to the 2nd defendant to pay off an outstanding water bill such that water supply to the

toilet herein, which had previously been disconnected due to the outstanding water bill, was supposed to be restored by the 2nd defendant.

19. Around the same time, the 1st defendant had instructed the 2nd defendant to relocate some water supply pipes to pave way for the construction works on the Zomba-Blantyre road. The 1st defendant asked the 2nd defendant to provide the cost for the relocation of the water pipes and for incidental costs associated with the restoration of the water supply system after the water pipes relocation exercise. The 1st defendant paid that said cost to the 2nd defendant.
20. Ordinarily, at this point the 2nd defendant was supposed to relocate the water supply pipes and then reconnect water supply to the toilet run by the claimant. However, the 2nd defendant received a water supply reconnection fee from the claimant but could not reconnect the toilet because the toilet building was marked for demolition, at the instance of the 1st defendant, to pave way for the dual carriageway that had been planned for that section of the Zomba-Blantyre road.
21. There is a valuation list compiled by the Regional Commissioner for Lands, for purposes of compensation for buildings affected by the Zomba-Blantyre road which includes the toilet building indicated to be that of the claimant.
22. The plans to construct a dual carriageway were later scrapped due to budgetary reasons. The 2nd defendant became aware that the dual carriageway plans were scrapped because it was a stakeholder in the whole process of the Zomba-Blantyre road construction project that was undertaken by the 1st defendant. Despite this knowledge, the 2nd defendant did not reconnect supply of power to the toilet run by the claimant. It is however not clear in the evidence as to when the decision to scrap the dual carriageway plan was made and when the same became known to the 2nd defendant.
23. The parties filed their respective submissions. Of course, it is trite that the claimant bring evidence to prove his claim to the requisite standard which is on a balance of probabilities. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
24. The claimant submitted that the Zomba-Blantyre road construction has affected his business. He noted that the defendants argue that the toilet building does not belong to him but to Zomba City Assembly. He asserted that since he built the toilet building in 2004, he has not paid any tambala to Zomba City Assembly as rental for the said building nor has the Zomba City

Assembly demanded any rental from him. He concedes that the land upon which he built the building does not belong to him. He however asserted that the defendants have not tendered any evidence to substantiate their claim that the building which he built in fact belongs to Zomba City Assembly. He pointed out that even the Regional Commissioner for Lands acknowledges that the building belongs to him. He asserted that to run the business, he was paying K20.00 daily to the Zomba City Assembly.

25. He then observed that the design of the road was changed from dual carriageway to single carriageway according to the 1st defendant and yet the building to date is still marked with a red star signaling demolition and water remains unconnected to the said building.
26. He asserted that he did not renovate the building, he in fact build the said building. He added that, to mitigate his loss, he removed the soil from the septic tank and cleared the surroundings.
27. He then noted that the defendants argue that the water to the premises was disconnected in 2011 and reconnection fee only paid in 2013. He asserted that the water supply to the premises was disrupted in July, 2014. And that whether or not the premises had water supply between 2011 and 2013 is not an issue. He observed that, in fact, according to the 2nd defendant, the Claimant paid a reconnection fee for the water in 2013. He then asserted that the road construction affected him from early July, 2014 when the defendants' agents and servants removed pipes supplying water to the said toilet and damaged part of the toilet and septic tank.
28. He then submitted that, the fact that the 1st defendant did not make any provisions for other disruptions apart from the relocation of the 2nd defendant's pipes is of no concern to him. Further, that the fact that the 2nd defendant has not been informed by the 1st defendant of the change in the road design from dual carriage way to single carriage way is also of no concern to him. He asserted that what is of concern to him is that the construction of the road has affected his business.
29. He submitted that the actions of the agents and servants of the defendants have impacted on his livelihood for which he needs to be compensated. He submitted further that he was owed a duly by the defendants to see that the

road construction would not affect him. He added that in the words of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who then in law is my neighbour? Receives a restricted reply. The answer seems to be – persons who are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called the question.

30. He concluded that he should be paid damages for the loss and damages that he has suffered.
31. On its part, the 1st defendant observed that the claimant's claim is based on the tort of negligence. And that negligence is defined as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. *Blyth vs Birmingham Waterworks Co*, (1856) 11Ex 781.
32. It observed that in *Gaffar v Press Bakeries Ltd and Another*, Civil Cause Number 2269 of 2002 (High Court) (unreported), the Court held that liability in negligence arises when the act or omission results in damage or loss to a person whether in form of personal injury or property damage or loss.
33. The 1st defendant observed that the tort of negligence has three ingredients, namely, a legal duty on the part of the defendant towards the claimant to exercise care in such conduct of the defendant as falls within the scope of the duty; a breach of that duty; and consequential loss or damage to the claimant.
34. It then submitted that in *Kanjira v Carlsberg (MW) Ltd and Nico General Insurance Co Ltd*, Personal Injury Case Number 932 of 2011 (High Court) (unreported), the Court held that, it is important on a claim of negligence to show that the wrongdoer's omissions, commissions or actions caused the injury complained of.
35. The 1st defendant then submitted on whether it breached any duty of care towards the claimant. It noted that in the matter herein, it alleged is that it damaged the pipes that were supplying water to the claimant's toilet. It

asserted that the question to be asked is; who owns these pipes? To whom did the 1st defendant owe a duty of care with regard to these pipes?

36. It then observed that section 25 of the Waterworks Act provides that all supply pipes shall be the property of the Board. And that under the scheme of the Waterworks Act, the supply pipes to premises up to and including the meter at the premises are the property of the Water Board and the Water Board is responsible for their maintenance, repair or replacement. See also By-law 100 of the Waterworks (Southern Region Water Board) By-laws.
37. It asserted that it owed a duty of care to the 2nd defendant not to damage its supply pipes. And that, however, being cognizant of the fact that the nature of road construction inevitably leads to damage/removal/disturbance of the supply pipes, it, in advance, paid compensation to the 2nd defendant to allow it to promptly repair or replace any supply pipes damaged/removed by the road construction.
38. The 1st defendant then asserted that it also had the 2nd defendant's representative on site throughout the duration of the project to attend to any issues to do with damage or removal of water supply pipes. It asserted further that having received the compensation for the anticipated damage to its supply pipes, the 2nd defendant assumed the responsibility to immediately repair or replace the supply pipes. And that it therefore was in no breach of any duty of care to the claimant.
39. It then submitted on whether it damaged the claimant's septic tank and toilet building. It noted that during cross-examination, the claimant failed to show the court the damage that was occasioned to the building due to the road works. Further, that the septic tank that was alleged to have been damaged was not damaged at all. It submitted that this claim must fail.
40. The 1st defendant then submitted on whether the claimant has standing to maintain the present proceedings. It submitted that there is evidence that the property the subject of these proceedings is not the claimant's and that it belongs to Zomba City Assembly. And that the claimant is a mere tenant.
41. It added that there is also evidence that there was no formal lease agreement between the claimant and Zomba City Assembly apart from a letter allowing the claimant to run the pay in toilet. And that according to the said letter, the money that the claimant used in renovating the structure would be treated as

a prepayment of rentals. Further, that it is in evidence that since 2004, the City Assembly never demanded further rentals from the claimant.

42. The 1st defendant submitted that whatever the arrangement between the claimant and the City Assembly, there must be implied into their lease agreement *force majeure*, that the parties would be discharged from their obligations upon the happening of certain events beyond the parties' control which makes the performance of the contract impossible. And that one such event would be demolition of the property due to road construction.
43. The 1st defendant submitted that, the moment the property was marked for demolition, the contract between the claimant and the Assembly became frustrated. And that the claimant's remedy at that point lay in asking the landlord to provide an alternative property from which he could run his business or ask for re-imbursement of his rentals if there was still a balance.
44. It pointed out further that, if there was any claim to be brought against the defendants with respect to the property, the same can only be maintained against the defendants by the Assembly, the owner of the property, and not the claimant whose lease agreement was frustrated due to *force majeure*. It therefore submitted that the claimant lacks the standing to bring and maintain these proceedings.
45. The 1st defendant then submitted on whether the defendants can be held liable for loss of business. It pointed out that there is evidence on record which has not been disputed that by the time the pipes were being relocated, supply of water to the claimant's toilet had been suspended for non-payment of water bills.
46. And that for a period of almost two years, that is from 30th April 2011 to 25th March 2013 there was no supply of water to the premises for non-payment of bills. Further, that any business lost by the claimant during that period cannot be attributed to the activities of the defendants.
47. It noted that, however, by the time the claimant paid his bills and paid the reconnection fee, his lease with the Assembly had already been frustrated as the building had been earmarked for demolition. And that the 2nd defendant therefore could not reconnect water to a building that it knew would be demolished. Hence, at this point, the claimant's remedies lay against the landlord and not the defendants. And that, in the final analysis therefore, the claimant's action must fail for the reasons articulated above.

48. The 2nd defendant started by observing that in *BP Malawi Limited v NBS Bank Limited* [2009] MLR 39, Mtambo JA had this to say:

> We agree that in every case facts in issue are primarily determinable by substantive law and secondly by the pleadings. And that is how one proves one's case in that one then adduces evidence in the light of the laws and indeed the pleadings.

49. It observed further that evidence adduced at trial should therefore support the pleadings and that failure to adduce evidence in support of the allegations means that the party has failed to prove his case.
50. The 2nd defendant then submitted that the claimant did not bring or adduce any evidence that he and not Zomba City Assembly is the owner of the premises, he failed to bring or adduce evidence that the building was damaged by the acts of the agents of the defendants and he further failed to adduce or bring evidence that he has never defaulted payment of water bills for the premises and/or that water supply was disconnected because of the defendants' activities.
51. It then alluded to the burden and standard of proof in civil matters and submitted that there is no evidence of the claimant is the owner of the property which is subject to the proceedings herein. It asserted that the claimant is a mere tenant. And that there is no evidence of a lease between the claimant and Zomba City Assembly. Further, that there is only the evidence that the money used by the claimant in renovating the premises were treated as offsetting the rentals the claimant ought to have been paying to Zomba City Assembly.
52. The 2nd defendant then submitted that the contract between the claimant and Zomba City Assembly was frustrated the moment the building was earmarked for demolition. Consequently, that the contract of supply of water to the premises between the claimant and itself was frustrated the moment the premises were earmarked for demolition. And that it would not supply water to a building that was on a road reserve and earmarked for demolition.
53. It also contended that there would be no reconnection to a premise where there is frustration of the contract. And that the remedy to the claimant would have been to reconnect the said water supply to a new premise outside the road reserve. Further, that if such premises exist then it was the duty of the claimant to bring this to the attention of the 2nd Defendant and it therefore means the claimant sat on his rights.

54. It then asserted that, in summary therefore, if there was any claim to be brought against the defendants in respect of the property, then the same can only be maintained against the defendants by Zomba City Assembly, not the claimant who was a tenant whose tenancy agreement was frustrated.
55. Further, that there is no evidence of business loss by the claimant at the time the defendants were carrying out their activities including the period after 25th March, 2013 when the claimant had settled his unpaid bills, since the tenancy agreement between the claimant and Zomba City Assembly had been frustrated as the building was earmarked for demolition. And that the claimant ought to have known that the remedies his is seeking lay against the landlord, Zomba City Assembly and not the defendants.
56. In the analysis of this Court, it is absurd that the claimant had an agreement with the Zomba City Assembly to renovate or rebuild the dilapidated toilet building herein for the cash strapped Assembly and then set the same off with the rentals due from him to the Assembly yet no rentals were paid or asked for but only a daily K20 fee was paid. This was a very unsatisfactory state of affairs. The residents of Zomba City were being short changed by the claimant and the administrators at the City Assembly. This should not have been allowed to happen as the claimant ripped profits without end and without paying what was due to the Assembly. This kind of poor administration is what threatens to bring this country down to its knees economically and development wise. It should not be condoned.
57. In the face of the clear preceding evidence it cannot be correct that the claimant owned the toilet building. It was also wrong for the Regional Commissioner for Lands to include the claimant as a beneficiary for compensation to be paid for damage to the toilet building in the circumstances herein where he never paid rentals for many years despite the agreement between him and the City Assembly. This is unacceptable.
58. This Court therefore agrees with the defendants that the toilet building, and whatever was built by the claimant along with the said toilet, was owned by the Zomba City Assembly. The claimant cannot therefore claim loss on the basis of alleged damage to the said property.
59. In any event, this Court agrees with the defendants that no damage was actually revealed to the buildings at the site when evidence was given by the claimant. Consequently, the claimant's claim alleging damage to the toilet,

toilet pans and septic tank is untenable. It accordingly fails against both defendants for lack of proof of ownership.

60. That leaves the claim for loss of business. The evidence is clear that the claimant was running a pay in toilet business. This Court agrees with the 1st defendant that it did what it ought to have done as a reasonable entity in the circumstances to ensure that its actions in getting the water supply pipes relocated did not disrupt the water supply to the customers of the 2nd defendant. The 1st defendant paid the 2nd defendant for the water supply pipes relocation. Its actions were without any breach of duty to the 2nd defendant or its customers including the claimant.

61. However, this Court does not agree that the 1st defendant only owed a duty of care to the 2nd defendant not to damage the pipes because damage to water supply pipes would also affect water supply end-users who should have been in contemplation of the 1st defendant as neighbours at law as defined in *Donoghue v Stevenson*

62. The 2nd defendant having been paid to take care of water supply pipes relocation, in turn, owed a duty of care to the claimant as one of its customers to reconnect him so that he could carry on his pay in toilet business. The 2nd defendant cannot give the excuse that it could not reconnect the claimant, after getting his reconnection fee, because the pay in toilet was marked for demolition.

63. The 1st defendant clearly showed that the 2nd defendant knew that the demolition of the toilet was not going to happen because the dual carriageway plans were abandoned. The 2nd defendant is therefore guilty of negligence in that regard and caused the claimant to lose his business.

64. The defendants' argument that the claimant's contract with the City Assembly got frustrated by a *force majeure* cannot hold in the foregoing circumstances.

65. In the premises, the claimant succeeds on his claim for loss of business as against the 2nd defendant whereas his claim against the 1st defendant in that regard fails.

66. Damages for loss of business shall be assessed by the Registrar if not agreed within 14 days of this decision. The loss of business shall be reckoned from July 2014 to date of assessment.

67. Costs normally follow the event and shall therefore be for the claimant as against the 2nd defendant. The 1st defendant shall bear its own costs in the circumstances.

Made in open court at Blantyre this 10th September 2020.

M.A. Tembo
JUDGE