

REPUBLIC OF MALAWI
JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 241 OF 2019

BETWEEN

MANICA FOREX BUREAU LIMITED.....CLAIMANT

-and-

JAMES SOCHERA.....DEFENDANT

Coram: Honourable Mr. Justice J. M. Chirwa

Mr. Katuya, Counsel for the Claimant

Mr. Chipembere, Counsel for the Defendant

Doreen Mithi, Official Court Interpreter

RULING

Introduction:

There is before this Court an application by **Manica Forex Bureau Limited** (the above-stated Claimant) for judgment on admission made pursuant to Order 12 Rule 28 of the Courts (High Court) (Civil Procedure) Rules, 2017 (“the CPR”).

The application is supported by the sworn statement of **Andrew Dowell Katuya**, of Counsel, and Skeleton Arguments.

The application is opposed to by the Defendant.

Background:

By a Summons (Special Endorsed) issued on the 17th of July, 2019 the Claimant claims against the Defendant the following:

- (i) The sum of MK37,245,585.25 being the balance of the cash unaccounted for by the Defendant to the Claimant;
- (ii) Loss of income the Claimant would have made by trading the local and foreign currencies involved in the shortage; and
- (iii) Costs of the action.

By his Defence dated the 12th of August, 2019 the Defendant, *inter alia*, (i) denies admitting embezzling any of the Claimant’s monies, and (ii) while admitting that he surrender his pension benefits to the Claimant but contends that the alleged agreement was procured by the undue influence of the Claimant’s servants/agents. In the alternative, the Defendant contends that he was not advised independently prior to the agreement and execution of the exhibit.

The positions of the parties hereto: -

First, the Claimant’s position:

It is the case of the Claimant that when the audit and cash count of the funds that were under the Defendant’s care were conducted in the presence of the Defendant it was discovered that cash amounting to MK47,711,748.09, composing of MK793,148.09 in local currency and MK46,918,960.00 in foreign currency, was missing from the safe. It is the case of the Claimant further that after a series of meetings between its Managing Director and/or Human and Administration Manager on the one hand and the Defendant and/or his assistant, **Kelvin Naming’ona**, on the other hand, both the Defendant and his assistant admitted liability for the missing money and committed to taking steps to pay back the money. It is the Claimant’s case still further that for that purpose both the Defendant and his assistant each signed a letter to the effect that they refund part of

the missing money from the proceeds of their pension benefits from NICO Life Insurance Company Limited. Exhibits "DJ3" and "DJ4" are copies of the letters. It is the case of the Claimant still further that when the Defendant's assistant received his pension benefits in the total sum of MK10,466,162.84 he paid the same to the Claimant but the Defendant failed to do likewise.

It is now the contention of the Claimant that Exhibit "DJ3" constitutes a clear and unequivocal admission of the Defendant's liability to it for the missing money in the sum of MK37,245,585.25.

Secondly, the Defendant's Position:

It is the case of the Defendant that it is his assistant who admitted responsibility for the loss of the money. It is the further case of the Defendant that Exhibit "DJ3" is not an admission of liability but only an agreement to surrender pension benefits. It is still further the case of the Defendant that Exhibit "DJ3" was procured by undue influence of the Defendant's agents/servants who drafted the same and/or that he was not advised independently prior to the execution of the same in March, 2019 and not 10th of August, 2018 as the date of the exhibit suggests.

In the alternative, it is the case of the Defendant that the said agreement is not tenable because one can not agree to have pension benefits attached. Section 73 of the Pension's Act has been relied upon.

The Issue for Determination:

Whether or not the Claimant is entitled to a judgment on admission in the sum of MK37,245,585.25 on the strength of the contents of Exhibit "DJ3".

Determination:

Order 12 Rule 28 of the CPR pursuant to which this application has been made provides as follows:

- "(1) A party may admit the truth of the whole or any part of another party's claim.*
- (2) The party may do this by giving notice in writing, such as in a statement of case or by letter.*
- (3) Where the only remedy which the Claimant is seeking is the payment of money, the Defendant may also make an admission in accordance with:-*
 - (a) rule 32;*
 - (b) rule 33;*
 - (c) rule 34; or*
 - (d) rule 35.*

(4) *Where the Defendant makes an admission as mentioned in paragraph (3), the Claimant has a right to enter judgment, except where:-*

(a) *the Defendant is a person under a disability; or*

(b) *the Claimant is a person under a disability and the admission is made under rule 33 or 35.*

(5) *The permission of the Court shall be required to amend or withdraw an admission”.*

The admission being relied upon by the Claimant in seeking judgment for the sum of MK37,245,585.25 is contained in Exhibit “DJ3”, a letter from the Defendant to the Human Resources Manager of the Claimant dated the 10th of August, 2018. Given that the said exhibit is not lengthy, this Court now proceeds to reproduce all its contents as follows:

“Dear Sir,

RE-PENSION BENEFITS

I authorise Manica (Malawi) Limited, to handle and take full control of my pension contributions and bonuses from NICO Pensions Limited, so that the Company recovers part of the money that was unaccounted for at the Bureau following a cash count”.

What is an admission of fact? In **Technistudy Ltd v Kelland** [1976] 3 ALL ER 632 **Roskill LJ** defined the subject matter as follows:

“As the cases show, an order (under Order 27 r3) should only be made under that rule if it is plain that there are either clear express, or clear implied, admissions”.

The foregoing definition was quoted with approved in **Chiwaya v Mvula** [2004] MLR 52 at p.54.

There are so many other local cases on the point. The cases of **Mahanah v Southern Bottlers Limited**, Civil Cause No. 1151 of 2001 [2002] MWHC 53, cited in the Claimant’s Skeleton Arguments, **Produce Marketing Suppliers Limited and Globe Electrical and Agricultural Company Limited v Packaging Industries (Malawi) Limited** [1984-1986] 11 M.L.R. 11 and **S.E. Masauli v Malawi Congress Party** [2007] M.L.R. 277 are but some of the many authorities on this point.

In the **S.E. Masauli** case, the Supreme Court of Appeal cited a dictum of **Sargant** in **Ellis v Allen** [1914] 1Ch.904 “that the object of the rule was to enable a party obtain speedy judgment where the other party has made a plain admission entitling

the former to succeed". The said Court did however, emphasise that the admission must be clear and unequivocal.

The pertinent question at this stage could be: "Do the contents of Exhibit "DJ3" reproduced above constitute a clear and unequivocal or a clear express or clear implied admission of the sum of MK37,245,585.25 for a judgment on admission to be entered by a court of law against the Defendant?" This Court prefers to answer this question in the negative.

First, it is worthy of note that in Exhibit "DJ3" there is no express mention of the sum of MK37,245,585.25 nor can the same be implied therein. Secondly, there is also nothing in the said exhibit from which it can be inferred that the Defendant had accepted responsibility for the money that was unaccounted for. It is also worthy of note that the Defendant was not the only officer of the Claimant directly involved in the management of the cash at the bureau, there was a cashier.

This Court is on the present facts constrained to find any evidence of an admission express or implied by the Defendant upon which a judgment on admission of the claim of MK37,245,585.25 can be entered against him.


But even if there was evidence of a clear express or a clear implied admission in the said exhibit, which is not the case here, the Defendant could still not be held bound to the contents thereof on the following grounds (i) the exhibit had been signed by the Defendant without legal advice (see **David Whitehead and Sons (Malawi) Limited Gwirize Clothing Factory** [1991] 14 M.L.R.72) and (ii) The attachment of the amounts paid out of a pension fund by way of benefits in respect of a member is prohibited by law (see Section 73(1) of the Pensions Act (Cap.55:02) thereby making the exhibit untenable in a court of law.

In short, it is the finding of this Court that the Claimant is not entitled to a judgment on admission for the sum of MK37,245,585.25 on the strength of Exhibit "DJ3".

Conclusion:

Following the findings above made this Court has no option but to dismiss the Claimant's within application. This Court makes no Order as to the costs of this application. It is so ordered.

Dated this 29th day of January, 2020.


CHIRWA J
JUDGE