



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 936 OF 2017

BETWEEN

Steven Njovuyalema Moyo.....Claimant

and

Attorney General Defendant

CORAM: *Madalitso Chimwaza, Assistant Registrar*
 Likhwa Mussa Counsel for the Claimant
 A. Mahonga Counsel for defendant
 C. Zude Court Clerk

ORDER ON ASSESSMENT OF DAMAGES FOR LOSS OF BUSINESS AND PROFIT

1 **INTRODUCTION**

This matter was set down for assessment of damages for loss of business and profit following a summary judgment entered on 3rd April, 2020 in favour of the claimant thereby settling the issue of liability.

· **Brief Facts and Evidence**

2. The claimant was the only witness a businessman plying his trade in the hospitality industry known as Shiri River Tourist Resort in Liwonde Township. Malawi Government under the Shire River Basin Management Programme funded by the World Bank embarked on a project (Kamuzu Barrage II Project) to upgrade the Kamuzu Barrage on the Shire River at Liwonde.
3. The claimant was informed in 2013 that his property Shiri River Tourist Resort was among the properties to be adversely affected by the rehabilitation of the Liwonde Barrage for the period of the project which was estimated to run from 2013 to 2016. The claimant duly admitted to have been compensated for the projected losses up to 2016 in the sum of Thirty Seven Million five hundred Thousand Kwacha (K37, 500, 000.00). Unfortunately the project was extended up to 2018 hence the claimants claim for compensation for the extended period which has led to the claimant to suffer further loss and damage. The claimant alleged to have suffered optimal loss of use of the business premises and loss of business. The claimant is seeking compensation for the loss of optimal use of the business premises, loss of income, interest and costs of this action.

4. During the hearing on assessment the claimant adopted his witness statement and was cross examined by the defendant and in response to one of the questions the claimant said he was claiming compensation for the period from 2016 to 2019. The claimant said he was claiming loss of business for 12 rooms at the lodge, 6 of which were complete at the time the contractor came to start the work and 6 others were still under construction. He said he had a conference facility that could take up to 45 people and he used to host meetings for 15 days of the month.
5. He however admitted that indeed he had a conference hall which was unfinished at the time the contractor came to occupy the premises and that what he was using as a conference hall was actually part of the restaurant which was on the premises. He said he operated the lodge for five months before it was taken over by the contractor and he used to make around MK7-MK9 million in one month, but he had no records to support this claim. The claimant admitted that he could not produce any evidence of bookings for meetings or accommodation, neither any evidence of bank statements or cash book records as proof that the place ever made any business at all because he lost them.
6. He told the court that the contractor hired the six rooms that were complete by then and one of the agreement terms was that he would finish improving the remaining six rooms. The contractor was paying K700,000.00 per month and in one year he was making MK8,400,000.00.
7. The claimant admitted that he was claiming close to one billion kwacha as loss of business. He submitted
8. When the court visited the scene it observed that there were 12 rooms, 6 of them complete and in usable state while the other 6 were not. There was an incomplete conference hall and a kitchen not yet roofed.
9. The 1st witness for the defendant was Mr. Nyasulu who was a Senior Water Resources Officer and Site Representative for Ministry of Agriculture, Irrigation and Water Development at the Kamuzu Barrage Upgrading project. He adopted his witness statement where he stated that the contract period was 1,143 days (translating to 3 years) running from 1st October, 2014 to October 2017. The claimant was paid compensation on 9th May 2014, however the actual works by the contractor started in October, 2014 and were to end in October 2017. The works were to be completed in January 2018 because of the additional 84 days period for payment finalization process. The project was extended by 1 year 3 months due to other unforeseen circumstances.
10. The 2nd witness for the defendant was Mr. Mabvuto Phula, a Lecturer in Land Economy at Polytechnic and also a Registered Property Valuation Surveyor, private consultant trading as CMC Property Consultants and Valuers. He was invited as a witness of fact as he was once a civil servant with Ministry of Lands when he was engaged to do valuation of the property for the initial compensation.
11. He said in 2013 Malawi Government under the Shire River Basin Management Programme funded by the World Bank embarked on a project (Kamuzu Barrage II Project) to upgrade the Kamuzu Barrage on the Shire River at Liwonde. The Project was estimated to be completed within a period of 3 years from October 2014 to October 2017, however due to unforeseen circumstances the project extended to April, 2019.

12. He said prior to the commencement of the project he was engaged to do a compensation assessment, and on 2nd July 2013 a report was delivered to Ministry of Agriculture, Irrigation and Water Development. Marked as exhibit **MP 1**. The findings were summarized on pages 8 and 9 of the report and stated that:
 - a. The lodge had been under construction since early 2000
 - b. The lodge had six accommodation rooms that were operational and another six that were under construction
 - c. There was a restaurant that was used to serve breakfast to guests
 - d. The lodge had a conference centre that was still under construction at roofing level
 - e. The properties to be affected by the project were a house, an old restaurant, a reception and a gate house which were all under construction which had stalled.
13. This witness said after assessment compensation amounting to MK37,000,000.00 was paid for loss of business and for the property to be affected by the project.
14. Dw 2 was engaged again on 24th July 2020 to do assessment for loss of business at Shiri Tourist Lodge for the period from January, 2018 to April, 2019. His findings were contained in a report he submitted to Ministry of Justice on 4th August 2020 and exhibited as **MP 2**.
 - a. The lodge still had six operational rooms
 - b. The lodge still had another set of six rooms not operational
 - c. The lodge still had a restaurant not operational
 - d. The lodge had a conference facility still under construction at roofing level
 - e. For the duration of the project the lodge was rented out to project contractors at MK700,000.00 per month.
15. When cross examined on his evidence he conceded that when he was doing the assessment he was not aware as to when the three years was to start running and when it was to end, but according to the report after paying compensation in May 2014, the contractor started the works in October, 2014 and he could not tell exactly when the property was released to the contractor.
16. He went on to say that during assessment in 2013 there were 6 rooms which were operational and six others were under construction which appeared to have stalled at the time of assessment and it was not true that the works had stopped because of the contractor. He said in the current assessment he considered the 6 rooms, bar, restaurant, salaries of workers, food and drinks, cleaning and utility bills. He admitted to have excluded conferencing because there was no conference facility or room, the one on site was and still is under construction. He further said he adopted the rate of 60% occupancy after visiting the other lodges around the area and that his assessment was for a period of 16months from February 2018 to March 2019.
17. When re- examined this witness said his report had considered devaluation and compared the prices with other lodges trading in the area.

Issue for Determination

What is the extended duration of the project that ought to be compensated

How much should be the additional compensation.

GENERAL PRINCIPLES ON DAMAGES

18. The starting point in looking at the law on Compensation with regard to property rights and loss of business is the **Constitution of Malawi in section 28(1) (2)** where it guarantees that “*every person shall have the right to acquire property... and that no person shall be arbitrarily deprived of property. Section 44 of the Constitution further states that “Expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation”*, provided that there shall always be a right to appeal to a court of law.
19. **Section 10 of the Land Acquisition and Compensation Act, (2016)** provides the grounds for compensation to be as follows: loss of occupational rights, loss of land, loss of structures, loss of business, relocation costs, loss of goodwill, cost of professional advice, nuisance loss or reduction of tenure and disturbances.
20. The court has noted that the initial assessment for compensation was done in compliance with these legal principles, however there was a breach of contract as the period for completion of the project got extended for which the claimant was not compensated and he continued to suffer loss of business as there was blockage of passage to the lodge. Therefore the second assessment is justified.
21. Stating the position of the law Kapanda, JA as he then was in **Gestetner Ltd (NCR) OEC vs Malawi Revenue Authority [2008] MLR** said

...the traditional approach of the law has been that a person who is in breach of a contract is liable for all the damage that flows naturally from the breach according to the ordinary course of events or that which was within the contemplation of the parties at the time of making the contract. Where there is special damage not arising from the ordinary course of events, the defendant can only be liable where he had knowledge of the facts giving rise to the damage.
22. It is trite law since the case of **Hardley vs Baxendale [1854] 9 Ex,341** that damages would be awarded to compensate the plaintiff for and to the extent of losses that arise and flow naturally from the breach of contract, which damages were or ought to have been within the contemplation of the party in default.
23. Damages for loss of use of a profit earning chattel are special damages and as such must be specifically pleaded and particularized and, of course, proved. The measure is based on the nature of business the chattel was put to and the general return there from. (See **Namandwa v. Tennet & Sons 10 MLR 383** applying **Barrows Engr. Ltd v. Jewa**, Supreme Court of Appeal, Civil Cause No. 7 of 1981, unreported, at p.386).
24. In the case of **Harvey vs Crawley Development Corporation (1957)**, it was stated that the owner of land and improvements affected by compulsory acquisition has;

“ the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in public interest, but on the other hand no greater.”

25. In the present case it is not in dispute that the claimant ought to be compensated for the extended period to recover loss of business and profit.

ANALYSIS OF LAW AND FACTS

Duration of Extension to be compensated

26. In the present proceedings it is not in dispute that the defendant's project exceeded the period for completion. However what is not clear is the exact period of extension. According to the claimant he conceded to have been paid compensation for three years for a period spanning from 2013 to 2016 when the project was expected to run.
27. In his statement of claim dated 10th November, 2017 filed with summons on 6th December, 2017 his claim was that he was claiming loss of business for 2 years without specifying the exact months. On 18th March, 2020 a summary judgment was granted. The sworn statement in support of the summary judgment also indicated the period of 2 years for loss of business.
28. In his witness statement for assessment of damages made on 13th July 2020, the claimant is claiming loss of business from January, 2016 to March, 2019 translating to 39 months. Having gone through the whole file there is no indication that the statement of claim was amended to include the period to 3 years and 3 months. The statement of claim is very specific that the period of extension was two years.
29. The law on pleadings is clear that the statement of claim should contain all pleadings and the court will not make a determination on the issues that were not pleaded. The issue of period for loss of business is crucial for purposes of determining how much should be paid as loss of business. Therefore the claimant should have been specific on the period. The claimant will not be allowed to adduce evidence different from what was pleaded.
30. The defendant on the other hand told the court that they assessed the properties for purposes of compensation around April in 2013 and the report was ready and submitted to the Ministry of Agriculture on 2nd July 2013. The actual compensation was paid in May, 2014. According to the contract document the period was to start running from 1st October 2014 to October 2017 for 3years.
31. The court has noted that the claimant did not specify the exact month he handed over the premises to the contractor. The claimant does not say anything as to what was happening at the lodge which was a running entity from the time he received the compensation money in May, 2014 to the time the actual works started in October 2014. Surely for a business which was up and running it does not make economic sense for one to stop running the business just because there was an assessment exercise. According to the contract document dated 4th August 2014, the project site had not yet been handed over as at this date. The court is mindful that the claimant was not a party to this contract however, the defendants should not be held liable for losses that had not yet started. The period from May to October, 2014 the claimant still had access to his lodge and was entitled to continue doing business. If there were any losses suffered they should not be attributed to the defendant. Therefore for purposes of period to be calculated for loss of business, this court will calculate from November 2017 since the period in the contract expired in October, 2017. In this case it will be 17months from November 2017 to March 2019.

Extent of business loss

32. The claimant informed the court that prior to the contractor coming to the premises the lodge was running for five months and it was making close to Seven to Nine Million Kwacha (MK7,000,000 -9,000,000.00) per month, but he had no records to support this claim. No records of bookings, no receipts of payments or bank statement was produced to support the claimant's assertion. This Court has difficulties to believe the claimant could make such a huge claim without any supporting documentation.
33. This court is mindful that this is a claim for special damages which must be specifically pleaded and must be proved. In the absence of evidence to support the claim for loss of business of this magnitude it is difficult for the court to believe the claimant that he was making that much from lodge business.
34. The claimant further said the lodge had 12 rooms for accommodation, a conference Hall which was under construction not yet roofed, a kitchen and small conference hall that could host 45 people and the lodge was being engaged almost 15days of every month with meetings.
35. Upon physical inspection of the premises by the Court on 20th July, 2020, it was found that out of 12 rooms for accommodation only 6 were complete and in usable state. The Conference Hall was still under construction at roofing level and appeared to have stalled for a long time. There was a kitchen and a bar. There was no other conference hall apart from the one under construction.
36. The court found and concluded that the lodge had 6 rooms which were ready for use in business. Actually the claimant stated that the contractor rented out the six rooms and was paying K700,000.00 per month but he did not occupy the other six. This is evident that if there was any loss of business it is with regard to the six rooms only.
37. The court found that there was no conference hall therefore the claimant could not succeed in claiming loss of business on conferences and meals for conferences for 45 people in 15days of the month.
38. For purposes of computing the loss of business, the court will consider the six rooms on accommodation, the restaurant and the bar. The court will not include conferencing facility and meals as there was no operational conference hall.
39. The claimant in his submissions is claiming a total sum of MK 841,424,879.10, as loss of business profit for a period of three years and 3months. This sum was arrived at after assessing and comparing quotations from six lodges around Liwonde with the same standards as that of the claimant. These were from the following lodges: Annies Lodge, T&D, Zest, Wadonda, Splendor and HippoView. The claimant adopted an average of three quotations from the list of six lodges and used it to calculate for loss of business on conferencing, accommodation, restaurant and bar. The court appreciates the effort put in to come up with the estimated loss of business however, this included loss for conferencing which as it has been found there were no conference facilities and therefore the submissions are not a true representation of the loss.
40. On the other hand the defendant submitted that the estimated loss of business was in the range of K74,450,000.00 and K78,885,400.00. This figure was arrived at having considered other lodging facilities around Liwonde and this was in respect of accommodation, restaurant and bar. The defendant used the rate of K45,000.00 per night for accommodation in six rooms and

the occupancy rate of 60% (which translates to 18 days of the month). This rate was higher than the one adopted by the claimant which was K 43,333.33. It is the view of this court that this was a reasonable rate. For the meals and refreshments the court will use the rates submitted by the claimants as they represent a true reflection of the rates around the area. The court will adopt the defendant's approach which appears to have taken into account the occupancy rate of 60%, revenue collected less costs and 10% disturbance allowance. The court noted that the estimated net loss of business was for a period from February 2018 to March 2019 as per the evidence of the defendant's witness Marked **MP2**.

41. The Court will adopt the defendants formula however this will be for six rooms and for a period of 1 year 5 months (17 months) as already found in para 31 above. The cost for sales (revenue generated) the court has adopted the scenario presented by the defendants as it has captured the 6 rooms that have been awarded by court. However this is for a period of 17 months as already found above on para. 31.

ACCOMMODATION SIX ROOMS	MEALS	REFRESHMENTS
K 45,000.00 x 6 x 18 days x 17 months	K 9,400.00 x 6 x 18 days x 17 months	K5,000.00 x 6 x 18days x17 months
Total revenue: MK82,620,000.00	Total revenue: MK 17,258,400	Total revenue: MK9,180,000
The overall total revenue MK 109,058,400		
Less costs for sales: K2,744,000 x 17 months MK 47,158,000.00		
Net Loss of business and profit: MK61,900,000.00		

ORDER

Claimant is awarded MK61,900,000.00 as loss of business and profit. The claimant is also awarded 10% of the total net loss MK6,900,000.00 as compensation for disturbance The claimant is also awarded costs of these proceedings to be taxed if parties do not agree.

Either party aggrieved by this order has the right to appeal.

Made this 3rd day of August, 2021, in Chambers at Lilongwe District Registry- Civil Division.



Madalitso Khoswe Chimwaza (Mrs)

ASSISTANT REGISTRAR