IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CASE NUMBER 101 OF 2021

BETWEEN

FARGO LIMITED.....CLAIMANT

AND

ECOBANK MALAWI LIMITED.....DEFENDANT

Coram: **HON. JUSTICE C.W.M MALONDA**

Mr. John Suzi Banda, Counsel for the Claimant
Mrs. Isabella Mndolo, Counsel for the Defendant
Thoko Mwale, Court Clerk.
Mrs. G. Mtambalika, Court Reporter

Mesikano-Malonda J

JUDGEMENT

INTRODUCTION

1. FARGO (the Claimant), a construction company, had a long running business relationship with Ecobank Malawi Limited (the Defendant) a commercial bank.
2. Over a period of over 8 years, Fargo was provided access to various credit facilities by the Defendant, including overdraft facilities. The

condition of the overdraft facilities provided for charging of penalty interest, which was triggered by default in timely repayment of the loan. Along the way, incidents did occur that occasioned Ecobank invoking the charging of the Penalty interest, resulting in the debt piling up to an astronomical figure.

3. Fargo seeks the Court's declaration that the Ecobank's charging of penalty interest was illegal, unlawful, unenforceable, and against public policy. Fargo further prays to the Court that it re-opens the loan transaction under section 3 of the Loan Recovery Act and determine that it is harsh and unconscionable.
4. Further, Fargo seeks an order declaring that the outstanding balance on the credit facilities was MK136,079,158.91 as of 31st December, 2020 and not Ecobank's counter-claims that the sum MK1,343,203,284.26 as outstanding.
5. Ecobank refutes the claim and counterclaims for the outstanding balance of MK1,343,203,284.26, furthermore, a realisation of the securities pledged.

FACTS

6. Though the parties have presented their facts in an almost complicated way. The detailed facts of this case are straightforward. The claimant is a construction company and the Defendant, a commercial bank. In May 2018, the claimant obtained credit facilities, being a K1.5 billion overdrafts and a K1.3 billion bank guarantee from the Defendant's bank.
7. The claimant and defendant made a credit facility agreement in which the claimant used two properties as security (among other unspecified securities). The credit agreement was that the overdraft would be payable at a base lending rate of 25% per annum. It further had a penalty interest clause which stipulated that any amounts above this limit would attract further penalty interest at 10% per annum. The interest and penalty interest were agreed to. The facility was to last until 2018, however, the claimant did not clear this and it continued to accrue interest. The defendant went to claim this amount but the

claimant failed to pay, which resulted in the defendant issuing a statutory notice to exercise its power of sale over the securities.

8. The claimant believes that this kind of penalty interest is illegal and against public policy. The Claimant pleads with the court to reopen the transaction in line with Section 3 of the Loan Recovery Act. The claimant seeks an order declaring that the outstanding balance on the credit was **MK136,079,158.91** as of 31st December 2020. The defendant claims that **MK1,343,203,284.26** is outstanding and has counter-claimed for the balance.

ISSUES FOR DETERMINATION

9. The following matters were agreed to proceed to trial:

(a) Whether the parties agreed to the terms and conditions of the credit facility advanced to the Claimant; If so

i. Whether the Defendant breached those terms; if so

1. Whether the Defendant distorted the loan balance resulting in an error in the Balance owed, resulting in the Claimant being charged a penalty interest;

2. Whether the penalty interest charge is lawful warranting reopening of the transaction, in light of public policy, section 3 of the Loans Recovery Act, harsh and unconscionable or whether the penalty interest charge was fair compensation based on the Claimants risk profile;

ii. Whether the Defendant is entitled to the counterclaim of MK1,343,203,284.26 and all reliefs thereunder;

iii. Whether the outstanding balance on the credit facilities is MK136,079,158.91 or MK1,343,203,284.26;

iv. Whether the Defendant is entitled to realise the securities following failure by the Claimant to pay the outstanding balance;

v. Whether the Claimant is entitled to the claims in the Statement of Case;

LAW

Standard and burden of proof

10. This being a civil matter, the applicable standard of proof, is proof on a balance of probabilities, ***see Miller v Minister of Pensions [1947] 1 All ER 372.*** The burden of proof rests upon the party asserting the affirmative of the issue – see ***Malawi Distilleries Ltd v Sichilima [2001-2007] MLR (Com) 164***.
11. The Supreme Court in ***Commercial Bank of Malawi v Mhango [2002-2003] MLR 43 (SCA)*** highlighted that the burden of proof in a particular case depends on the circumstances in which the claim arises. It was also stated that the law on burden of proof in civil matters is an ancient rule founded on mature considerations of good sense and should not be departed from without strong reasons.
12. The Claimant has the burden of proving the elements of his/her suit. ***See Commercial Bank of Malawi v Mhango [2002-2003] MLR 43 (SCA). See also Tembo and others v Shire Buslines Ltd [2004] MLR 405.***
13. It is a well settled principle of law which is embedded in the Latin maxim ***"ei incumbit probation qui decit non negat"*** that the burden of proof lies on the party alleging a fact of which corrective rule is that he who asserts a matter must prove it. The party on whom lies a burden of proof must adduce evidence of the disputed facts or fail in his contention. ***See, Donnie Nkhoma v. National Bank of Malawi Civil Cause No. 2174 of [1996]***
14. The rest of the law related to penalty interest and unconscionable conduct is properly explained and cited in my analysis.

ANALYSIS

15. The Claimant paraded his evidence through two witnesses. PW1 **Aamir Jakhura** and PW 2 **Hamlet Malika.** The Defendant paraded his evidence through two witnesses, DW 1 **Tionge Mkandawire** and DW2 **George Mphuza.**
16. In summary the testimony of **PW1** is as follows:
17. The K2.8 billion loan was secured by two properties. He showed the letter in which all of the terms were agreed **see exhibit AJ1**. The claimant had been repaying the loan but due to financial difficulties, they were unable to finish and the Defendant's inclusion of the penalty interest resulted in their loans being unreasonably bloated.

18. It is the testimony of PW1 that the Defendant has overcharged interest on numerous occasions and the claimant appointed a creditor to analyze the loan but before it could be finished, the defendant sent a letter claiming the sum of MK 1.6 billion or to resell the charged properties. The claimant further engaged another bank which told them that the penalty interest was illegal and that the defendant's interest was overstated by K1.5 billion. However, the defendant rejected the claimant's claims without recalculating or reconsidering the amount. After meetings with the defendant, the amount was reduced from 1.6 billion to 1.3 billion without a proper explanation.
19. It is submitted that the 1.3 billion owed includes penalty interest which is not justifiable since the normal interest is already high.
20. In cross examination, the witness said that he had accepted the terms when applying for the loan. He said that he found out the interest rate was unjustifiable after he spoke to another bank. He presented evidence that the defendant's calculations were wrong.
21. In cross-examination, **PW1** confirmed that prior to the Defendant advancing the credit facilities, it was giving the Claimant offer letters that contained the terms and conditions of each credit facility. **PW1** also confirmed that the said terms and conditions included the term on the pricing of the credit facilities and that under the pricing term was the provision for interest to be applied and the default rate.
22. He further confirmed that the Claimant agreed to the terms and conditions when it accepted the offer letters and signed them. The Board Resolution, see **Exhibit TM9** also refers.
23. The next testimony was from **PW2** Hamlet Malika. The witness is a certified auditor. He testified that in November 2018, he was engaged by the claimant to review and compute interest payable over the credit facilities. He calculated the interest between 1st Jan 2018 and 1st Jan 2021 He used the rates provided to do the computations. He found that the difference between his calculations and the defendant's calculations was MK1.4 billion. However, he did not include the penalty interest in his calculations as he thought it was unlawful. He noted two problems with the defendant's calculations, firstly computation errors and secondly that the defendant was applying penalty interest.

24. In cross-examination, **PW1** admitted that the Claimant exceeded the approved limit and that the same happened more than once.
25. **PW 2** further testified that the penalty rate was applied in two instances, either when the facility had expired, or when the limit was exceeded. In his view, it is standard practice that when the transaction limit is exceeded, the system notifies the client and therefore penalizing a client who was not warned is unfair. He finally submitted that the figure is big because of the addition of the penalty interest, without this, the amount owing would be MK136 million.
26. The Defendant is challenging the proceedings as well as claiming the sum of MK1,343,204,284.26 as the outstanding balance on the credit facility it advanced to the Claimant in 2018, interest thereon, an order that the Defendant exercise its power of sale over the properties securing the repayment of the credit facility availed to the Claimant, collection costs, and costs of the action (counter-claim) from the Claimant.
27. The Defendant on the other hand testified that it complied with the terms of the credit facilities and that interest was calculated in accordance with the terms and conditions of the credit facilities. In the evidence in chief of Tiwonge Mkandawire, **DW1** in paragraph 15 of her witness statement and George Phuza, **DW2** in paragraph 18 of his witness statement, the testimony is that the Defendant applied interest according to the contractual agreements between the parties.
28. The defendant admits that the Claimant was charged penalty interest rate when he exceeded the agreed limit.
29. See **Exhibit AJ1, TM 12** and **GP4** which is the credit facility, the subject matter of these proceedings provided the following on interest:

Interest Rate	Advances in Current Account will attract interest at EMW's base lending rate (currently at 25% per annum). EMW may in its sole discretion revise its base interest rate by notice in the newspaper and the Borrower acknowledges that such notice shall be adequate. If the new interest rate is not acceptable to the Borrower, they shall immediately pay all outstanding sums before the commencement of the new rate. Interest shall apply and be computed on a daily basis on the portion of the facility utilized by the Borrower. The interest charge shall be passed into the customer's account on monthly basis and if an outstanding balance at any time shall exceed the facility limit due to monthly and interest charges, the Borrower shall arrange as soon as possible to bring the outstanding balance within the credit limit.

Default Rate	Any amounts above the limit for Advances in Current Account will attract a **penalty interest** at EMW'S base lending rate plus a margin of 10% per annum. In the event that EMW having to pay claims made against Fargo Limited under the guarantee due to non-compliance with the guarantee's terms and conditions, any amounts for such claims settled will attract a **penalty interest** at EMW's base rate (currently 25% per annum) plus a margin of 10% per annum.

30. The Defendant argues that the additional interest for any amount above the limit for advances in current account is headed "Default Rate" but inside the clause, the Defendant uses the term "**penalty interest**". Thus, it may be argued that on the face of the credit facility itself, the additional interest is penalty interest and therefore unenforceable.
31. In some cases, cited the mere use of the word "penalty" is not conclusive and therefore does not render the provision penal and unenforceable. The defendant invites the court to consider the real nature of the transaction. see ***Clyde Engineering and Shipping Co Ltd v Don Jose Ramos Yzquierdo Y Castaneda [1905] AC 6]*** , **and *Harry Gunda t/a Halls Protective Clothing General Dealers v Indebank Limited Commercial Case No. 186 of 2015*** cases **.**
32. The Defendant further argues , by distinguishing the current case and the ***Harry Gunda case (supra)*** , that the nature of the transaction between the parties herein was very much like the one in the ***Speedy's Ltd v Finance Bank of Malawi [2001-2007] MLR (Com) 373*** case in so far as it involved an overdraft facility and is therefore very different from the nature of the transaction in the cases of ***Harry Gunda case*** (supra) and ***National Bank case*** (supra) which involved a loan facility in which periodic instalments were to be made to repay the loan.
33. The Defendant's witnesses both testified and in cross-examination their evidence that the default, otherwise referred to as penalty interest rate was never intended to punish the Claimant as a Borrower. **Rather, it was intended to compensate the Defendant for taking unknown and unmitigated risk on the Claimant** (emphasis is mine).
34. Refer to paragraph 9 of **GP** and paragraph 18 of **TM**. The Defendant through its witnesses also defended their use of 10% for the unmitigated risk instead of any other rate.
35. Is 10% extravagant, exorbitant or unconscionable? The Defendant answers in the negative. DW2 stated that the use of 10% was not

extravagant, exorbitant, or unconscionable, because the Reserve Bank of Malawi, the Regulator of Financial Services Industry would have prevented or stopped the Defendant from using that rate.

36. I have attempted to explore the meaning of *unmitigated risks* since it is a fancy word that the Defendant has used on several occasions. According to Black's Law Dictionary, Ninth Edition, mitigation is defined as, "to make less severe or intense". Meaning, to mitigate is to take measures that reduce the damage caused by an event or something. Unmitigated risks therefore mean risks that are not mitigated or the absence of measures to reduce the damage that will result from defaulting in a loan.
37. In the ***Harry Gunda case*** (supra), 10% as default/penalty interest rate was held to be extravagant, exorbitant and unconscionable. The court opined that 2% would have been a genuine pre-estimate of loss. Though in the ***National Bank case*** (supra)**,** the Court held a different view of that conclusion. My immediate take on that issue is that what is commercially justifiable and what is excessive, is subjective and may tend to differ from case to case and from time to time. ***See Sikwese J*** in ***Mulli Brothers Ltd v National Bank of Malawi and another Commercial Case Number 92 of 2016 (unreported)***. It should therefore not be a sore spot for litigants if courts come up with different interest rates which are classified as exorbitant or not. The Court has discretion and latitude to change such goalposts as such are relative to the case at hand. However, what remains constant is whether the penalty interest is financially justifiable or not in that particular case.
38. The Defendant further argues that unless there is indeed empirical evidence to the effect that the 10% rate is extravagant in the financial services industry for overdraft facilities, the court should not hold the rate extravagant. The Defendant has not denied the use of a penalty interest rate in its calculation.
39. I will now turn my attention to my analysis of the evidence and the law.

(a) Whether the parties agreed to the terms and conditions of the credit facility advanced to the Claimant;

40. At this point it is clear that the parties are in agreement, in terms of the facts, especially the following:
41. It is agreed by the parties that they agreed to the terms and conditions of all the credit facilities and the Defendant advanced to the Claimant, including the facility of May, 2018 which is the subject matter of these proceedings valued at MK2,800,000,000.00 comprising of MK1,500,000,000.00 as Advances in Current Account (overdraft) and MK1,300,000,000.00 as guarantee see Paragraph 4 of PW1 **AJA**, the witness statement of Aamir Jakhura, and paragraph 5 of **GP**, the witness statement of George Phuza, **DW2** refer. See also the credit facility itself duly executed by both parties signifying their agreement to the terms and conditions of the credit facility appearing as exhibit **AJ1**, **TM12** and **GP4.** The said facility also provided for default interest or in some parts it is referred to as penalty interest in the agreement. The same was to be charged on any amount which is incurred above the limit for the advances in the current account. According to the default interest provision, if the account exceeded the said amount above the limit, it was going to attract penalty interest at the Defendant's base lending rate **plus** a margin of 10% per annum. The credit facilities were further secured by properties Title Number Mapanga 99 and Nkolokoti 288 among other securities, which the Defendant would have power of sale over, in the event of eventual default of payment.
42. Therefore, to answer the question whether the parties agreed to the terms and conditions of the credit facility, it is my finding that the answer is in the positive.
43. Moving on to the next closely related issue :

If so :

i. Whether the Defendant breached those terms

44. Based on the evidence tendered by both parties, I find the answer in the negative. The Defendant is not in breach of the terms of the contract, as he was simply enforcing what is in the terms and conditions of the contract. This is because the claimant did not dispute the inclusion of the provision in the terms and conditions of the contract, however, he started to dispute after he went to another Bank and he was informed that the provisions on Penalty interest were not lawful.

45. Where the parties have entered into a business transaction, the common intention to enter into legal obligations is presumed: see ***Edwards vs Skyway Ltd (1964) 1 WLR 349; Rose and Frank Co. vs J.R. Crompton & Bros, Ltd (1924) UKHL 2.*** If a contract is in writing, the courts have long insisted that, as a general rule, the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement. Neither of the parties may adduce any evidence to show that his intention has been misstated in the document. It has thus been held that it is firmly established as a general rule of law that parole evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. See ***Ecobank Malawi Limited vs. Harvey Kalamula, Civil Cause Number 434 of 2013.*** Though I qualify this position by stating that the courts are willing to set aside a contract where it is shown that the other party engaged in unconscionable conduct or an unconscientious use of power, ***Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*** **[1985] 1 All E.R. 303**.
46. I will now move on the next issue for determination:

i. if so;

1. Whether the Defendant distorted the loan balance resulting in an error in the Balance owed, resulting in the Claimant being charged a penalty interest;

47. Based on my findings in issue (a) in the paragraphs above, consequently, this affects the finding in this issue for determination. It is my finding that the defendant did not necessarily distort the balance owed by the Claimant out of error, but rather out of sanctioning penalty interest as per the agreed terms and conditions of service. As a general principle of common law of contract, parties are free to agree on whatever terms they want to govern their contractual relationship, cited in ***Engen Malawi V Beatrice Kachingwe Commercial Case Number 260 Of 2015 (Unreported), see also Suisse Atlantique Societe d'Armement Maritime SA v N.V. Rotterdamsche Kolen Centrale*** **[1967] 1 A.C. 361** and ***Photo Production Ltd v Securicor Transport Ltd*** **[1980] A.C. 827**. Modern legal policy favors the furtherance of trade, as such, commercial

men are accorded the utmost liberty of contracting, ***Homburg Houtimport B.V. v Agrosin Private Ltd (The Starsin)*** **[2003] UKHL 12, [2003] 3 W.L.R. 711.**

48. Moving onto the next issue for determination:

    2. ***Whether the penalty interest charge is lawful warranting reopening of the transaction, in light of public policy, section 3 of the Loans Recovery Act, harsh and unconscionable or whether the penalty interest charge was fair compensation based on the Claimants risk profile***;

49. Looking at all the evidence and the pleadings, it seems this is the real bone of contention between the parties. This is the smoking gun if I may put it that way! This whole case revolves around whether it was lawful or not for Ecobank Malawi to charge Fargo penalty interest. The rest of the issues which have been brought before this court are merely bells and whistles. The real issue is whether it is legal or not to charge penalty interest, and if it is not, the transaction should be re-opened. I will attempt to summarise the submissions from both parties.

Claimants submission on re-opening money lending transactions under the Loans Recovery Act

50. The claimants submits as follows: Section 3 of the **Loan Recovery Act** provides that:

> *"(1) Where proceedings are taken in any court for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of*

equity would give relief, the court may reopen the transaction, and take an account between the lender and the person sued, and may, notwithstanding any statement or settlement of the account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges, as the court having regard to the risk and all the circumstances, may adjudge to be reasonable; and, if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the lender, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent by a lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section where proceedings are taken for the recovery of money lent; and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalments thereof, may not have arrived."

51. In the cited case of ***National Bank of Malawi Ltd vs- Lilongwe Gas Company Limited*** (supra), a loan transaction was re-opened when the Defendant applied for the same under Section 3 of the Loans Recovery Act herein challenging inclusion of penalty payments.
52. Further, the Court in **Harry Gunda case** (supra) observed that Section 3 of the Loans Recovery Act herein provides a source of remedy to a person who is challenging the charging of penalty interest. The Court stated;

"Our Banking Act makes no provision for the rule against penalties. There appears to be no clear provision in other legislation such as the Competition and Fair Trading Act and the Consumer Protection Act addressing this issue except for the matter of banks colluding on interest charges. As such, common law, equity, and ***Section 3 of the Loans Recovery Act*** *are the only sources of relief to borrowers.* (Emphasis added)."

53. It would appear that in this case the Court did not consider ***section 43 of the Competition and Fair Trading Act*** and the complementary provisions in the ***Consumer Protection Act***. For posterity, I have therefore discussed the provisions briefly in the subsequent paragraphs to flush out relevant provisions the Court could have considered.

Defendants submissions on re-opening transaction under the Loan Recovery Act

54. The defendant submits as follows : Section 3(1) and (2) of the Loan Recovery Act, Cap 6:04 of the Laws of Malawi provides:

> *2. Where proceedings are taken in any court for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, is otherwise such that a court of equity would give relief, the court may reopen the transaction, and take an account between the lender and the person sued, and may, notwithstanding any statement or settlement of the account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and*

relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges, as the court having regard to the risk and all the circumstances, may adjudge to be reasonable; and, if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the lender, and if the lender had parted with the security may order him to indemnify the borrower or other person sued.

3. *Any court in which proceedings might be taken for the recovery of money lent by a lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section where proceedings are taken for the recovery of money lent; and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalments thereof, may not have arrived.*

55. In the case of ***Mulli Brothers Ltd v National Bank of Malawi and another Commercial Case Number 92 of 2016 (unreported) Sikwese J***. stated the following:

> *"The court will decide that a transaction is harsh and unconscionable if it is satisfied from the evidence of the borrower that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges are excessive. What is excessive will depend on the circumstances of each case."*

56. Digesting the testimonies, it is agreed that on more than one occasion the Claimant defaulted in fulfilling their credit arrangement, resulting in the Defendant charging default/penalty interest as per their contractual agreement. This resulted in the overall amount owed by the Claimant becoming so inflated and impossible to clear for the Claimant. This

triggered the Defendant moving in and exercising their power of sale over the securities charged (properties Title Number Mapanga 99 and Nkolokoti 288 among other securities).

57. With more focus on penalty interest, this is an issue which has been litigated and decided by this Court in past cases. Both parties have cited similar cases which they have canvassed from their divergent point of view.

58. Much as the Defendant has tried to argue that this court is not bound by the decisions of another court of similar jurisdiction, especially the decided High Court cases, I am convinced that one should be more than persuaded especially when the facts and relevant law are similar. I am more persuaded by the views of the MSCA see ***Chaponda & Anor. v Kajoloweka & Ors MSCA Civil Appeal 5 of 2017***, which explains a more detailed preposition,

> *"The High Court has persistently and consistently upheld this decision in ,* ***Trustees of Women and Law (Malawi) Research and Education Trust v Attorney General****, and very recently in* ***The State and Attorney General , ex parte Lameck Mtoza and other ex-employees of Malawi Savings Bank****. As stated earlier, the court a quo chose to depart from binding precedent and did not explain its reason for doing so. In this regard what* ***Dr. McNight R.E. Machika*** *observed in his book entitled* ***The Malawi Legal System: An lntroduction*** *perhaps should help all courts in the conduct of business that comes before it:*
>
> > *"Broadly stated, the common law doctrine of precedent is to the effect that each court in the hierarchy of courts is bound by the principles established by prior decisions of courts above it in the hierarchy and the courts of equal standing are with certain qualifications, bound by their own prior decisions (emphasis is mine). In a practice statement the Lord Chancellor of England announced modification in the Practice of the House of Lords. Though the House continues to regard its previous decisions as normally binding, it now feels free to depart from any decision "when it appears right to do so." A marked relaxation in the practice of the court of Appeal too has been noted. One can say*

very little against judges paying the greatest attention to earlier decisions of their colleagues in an effort to decide cases as they have always been decided. Human nature ensures this and justice according to law demands no less. But more is demanded by the English doctrine than this. It is that when a Judge is faced with a decision binding on him because it was delivered either by a court above him in the hierarchy or by one of co-ordinate jurisdiction, in theory he is bound to apply the principle laid down there though to his mind it is clear that the principle is wrong or incorrect. The doctrine of precedent is used interchangeably with the principle of stare decisis, which means to stand by decisions and not to disturb settled matters. The principle of stare decisis is of ancient origin and the reasons for it were stated to be stability and certainty in the law, convenience, and uniformity of treatment of all litigants. The idea was that a system of law which lacks certainty and stability would be faulty and undesirable. It would be impossible for a lawyer to give any dependable advice to a client. The result would be that the judge would apply to each particular case his own personal views and would substitute the desires of the law by his own desires. The decision of the court would lose all semblance of justice. As Spenser Wilkinson, C.J. explained in ***Kharaj v. Khan [1923-1960] ALR****. The result would be that the law will fall into confusion. In this state of confusion confidence in the honesty and integrity of the courts and is in their impartiality would not be maintained. Uncertainty in the law would lead to chaos and a breakdown of organized society***"**

59. My understanding of the above position is that, *the courts of equal standing are with certain qualifications, bound by their own prior decisions*. These certain qualifications include, but are not limited to similar relevant facts and similar relevant law. It would therefore be appropriate for me to take due consideration to the previous cases on penalty interest which have been decided by the High Court, especially

considering that the MSCA has not yet made a pronouncement on the same cases on appeal.

Claimants submissions on the law on penalty interest

60. The Claimant submits as follows: Penalty interest, is interest which is charged when a party defaults on its contractual obligations. It is triggered by, among other defaults, non-payment of the loan after the prescribed agreed repayment period has lapsed. see, ***NBS Bank Limited vs- Modern Business Management Limited and Henry Redson Mwale Commercial Case Number 81 of 2012***.
61. In ***Harry Gunda t/a Halls Protective Clothing General Dealers v Indebank Limited Commercial Case No. 186 of 2015*** it was observed that our statutory laws as they presently stand do not prohibit penalty interest. It is governed by common law under penal rule.
62. As regards whether penalty interest clauses are penal clauses and therefore unenforceable, the starting point is the case of ***Lordsvale Finance plc vs- Bank of Zambia [1996] QB 752*** in which the court was considering a common form provision in a syndicated loan agreement for interest to be payable at a higher rate during any period when the borrower was in default. It was held that the clause was valid because its predominant purpose was not to deter default but to reflect the greater credit risk associated with a borrower in default. The Court resonated that;

> *"no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach…*
>
> *If the increased rate of interest applies only from the date of default or thereafter, there is no justification for striking out as a penalty a term providing for a modest increase in the rate. I say nothing about exceptionally large increase. In such cases it may be possible to deduce that the dominant function is in terrorem the borrower"*

63. From the ***Finance plc vs- Bank of Zambia [1996] QB 752***, it seems to be the position that for default interest rates to be enforceable the following conditions must apply; the increased rate of interest must only apply from the date of default and the increase in rate must be modest. Thus, the courts will be unlikely to interfere with such an agreement as long as the rate of interest is not extortionate.
64. In the local case of ***Harry Gunda*** (supra), the Court seemed to agree with the proposition in the ***Bank of Zambia case*** (supra) as regards penalty interest. The Court stated;

> *"The 10% is exorbitant compared to the gravest possible loss to be suffered by the defendant on default by the plaintiff. In my view, 2% would be a possible genuine pre-estimate of loss. This is in line with my finding in* ***Speedy's Ltd v Finance Bank of Malawi*** *at p. 338 para a. that an additional 1.5% interest on accounts in excess of overdraft was reasonable"*

65. However, in the case of ***NBS Bank Limited vs- Modern Business Management Limited and Henry Redson Mwale*** (supra), the Claimant claimed penalty interest. The Court found that the same was not part of the parties' agreement so it could not be awarded. The Court further stated;

> *"So even if the parties herein had agreed that penalty interest would be charged on default, there would still have been the need for them to justify that that interest does not offend the rule against penalties. In the present case such justification is lacking. Thus, I do not see how I would have upheld the claim for penalty interest herein."*

66. Further, in ***National Bank of Malawi Ltd vs- Lilongwe Gas Company Limited*** (supra) the Court had reservations with the observations made by the Honourable Judge in the ***Harry Gunda case*** (supra) and indeed the position in the ***Bank of Zambia case*** (supra). ***Justice Katsala***, as he then was, stated;

> *"The judge did not explain the basis for finding that 2% would possibly be genuine pre-estimate of loss following a default. There is no indication that that he had the benefit of empirical evidence for him to come to such a conclusion. I do not think that this is a matter which a*

judge can come to such a conclusion without examining evidence. These observations also apply to the 1.5% suggested in the Speedy's case (supra)

In my judgment, compound interest would and does take care of the fear that may have exercised the judge's mind to come up with the suggested percentages of interest."

67. Thus, in the said case of ***National Bank of Malawi Ltd vs- Lilongwe Gas Company Limited*** (supra), the Court refused to enforce a penal clause in the contract for the following reasons;

    i. The said penal provision was not commercially justifiable at the time the contract was made in that there was no evidence that its predominant purpose was not to deter default but to reflect the greater credit risk associated with a borrower in default.

    ii. There was no relationship between the money to be paid as a penalty and the loss that was to be suffered or actually suffered by the Bank as a result of the breach of contract by the borrower. Thus, the penalty was found not to be a genuine pre-estimate of the loss to be suffered by the Bank on the borrower's defaulting on the instalments.

    iii. There was no proof that the Bank had legitimate interest beyond the compensatory which justified the imposition of the additional financial burden on the borrower in the form of penalty interest.

    iv. The provision imposed an additional obligation on the borrower as a punishment for the non-observance of a contractual stipulation. The said additional obligation was also found to be secondary with intent to punish the borrower for any failure to pay the agreed instalments.

The Court, in the above cited **National Bank of Malawi** case, concluded by saying that;

> *"When money is borrowed on compound interest basis, a borrower who defaults on repayments pays interest on interest because the interest which accrues during the period he is in default is capitalized. This means that when a borrower defaults on loan repayments, he suffers more interest because the longer he keeps the borrowed money, the more interest on interest he will pay. In my view, this takes care of the greater credit risk associated with a borrower in default. The lender is compensated for being kept out of the use of his money by the compound interest that continues to accrue on the loan. It is sufficient compensation for the greater credit risk. As such, there is no justification for the lender to demand additional interest on top of the agreed interest simply because the borrower has defaulted on repayments. Thus, I do not see any commercial justification for a default interest or indeed a penalty fee. The concept of commercial justification advanced by Colman J in* ***Lordsvale Finance pie v Bank of Zambia*** *(supra) and many other cases that applied it (****see Euro London Appointments Ltd v Claessens International Ltd*** *[2006] 2 Lloyd's Rep 436 and* ***General Trading Company (Holdings) Ltd v Richmond Corpn Ltd*** *[2008] 2 Lloyd's Rep 475), in my opinion, does not sound legitimately convincing. To demand penalty fee and/or default interest at whatever rate is commercially unjustified. It is simply punishing the borrower for failing to perform his primary contractual obligation, if not blatant extortion. Surely, the law should not condone that. It is even more hair raising when you bear in mind the economy we operate in, where interest rates on the money market can get as high as 40, 45% per annum or even higher. To charge 5 or 10% on top of 40 or 45%, or more as penalty interest is pure profiteering and/or "an example of common practice exploitation and not banking" (per Dr Mtambo J in* ***Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd*** *(supra))…On the foregoing, it is my judgment that the provision requiring the defendant to pay a penalty fee of K14,500.00 following a default on repayment of the agreed instalments is penal. And it is unenforceable."*

Defendants submissions on Penalty Interest

68. The Defendant submits as follows: A penalty is a punishment for non-observance of a contractual stipulation and it consists of the imposition of an additional or different liability upon breach of the contractual stipulation: ***Legione v Hateley (1983) 152 CLR.***
69. The general common law rule is that penalty clauses in contracts are unenforceable. The origins of this rule can be traced back as far as the 16th Century when the courts at that time were concerned and wanted to prevent exploitation in an age when credit was scarce and borrowers were vulnerable. See the landmark case of ***Cavendish Square Holding BV v El Makdessi, ParkingEye Ltd v Beavis [2015] UKSC 67, 3 WLR 1373.***
70. The mere use of the term "penalty" or "liquidated damages" in a contract is not conclusive of the rights of the parties to the contract. The court in the case of ***Clydebank Engineering and Shipbuilding Company Ltd v Don Jose Ramos Yzquierdo Y Castaneda [1905] AC 6*** was determining whether a clause providing that late delivery was to be penalised under the contract at the rate of £500 per week was a penalty clause or a liquidated damages clause. The lower court held that it was a liquidated damages clause and on appeal, the House of Lords upheld the provision as a genuine liquidated damages clause stating that though parties to a contract who use the word "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, the expression used is not conclusive.
71. In the case of ***Dunlop Pneumatic Tyre Co. v New Garagr and Motor Co [1915] AC 79,*** the court sought to restate the law on penalty rule. It distinguished between penalty clauses which are unenforceable and liquidated damages clauses which are enforceable provided that the specified sum is a genuine pre-estimate of loss. Lord Dunedin laid down four tests that were designed to be helpful in determining whether or not a clause was an unenforceable penalty. The four tests are:
    b. *It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in Clydebank Case.*
    c. *It will be held to be a penalty if the breach consists only in not paying*

a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (Kemble v. Farren).

d. *There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in Lord Elphinstone v. Monkland Iron and Coal Co).*

e. *It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties. (Clydebank Case, Lord Halsbury; Webster v. Bosanquet Lord Mersey).*

72. In the celebrated case of ***Lordsvale Finance plc v Bank of Zambia [1996] QB 752*** which is also the leading English case on default interest rates, the case concerned a syndicated commercial loan agreement in which a provision was made that in the event of default, the defendant was to pay interest during the period of default at the aggregate rate of the cost of obtaining dollar deposits to fund the banks' participation, the margin (which was defined as 1.5%) and an additional, but unexplained, 1%. The borrower defaulted and argued that the extra 1% constituted a common law penalty. Amidst authorities that such clause was penal and therefore unenforceable, Colman J disagreed and held that the clause was valid because its predominant purpose was not to deter default but to reflect the greater risk associated with a borrower in default. He observed that by defaulting, the debtor had changed the nature of the agreement and could no longer expect to be charged the same amount for the facility as he had done previously. The 1% increase was therefore justifiable.

73. The ***Lordsvale*** case was applied with approval in the cases of ***Cine Bes Filmicilik ve Yapimcilik v United International Pictures [2004] 1 CLC 401; Murray v Lesuireplay plc [2005]IRLR 946*** and ***Cavendish Square Holding BV v El Makdessi, ParkingEye Ltd v Beavis (supra).*** Lord Mance in the ***ParkingEye*** case put it as follows: ***"in a whole series of cases across the world, courts have taken the cue from***

Lordsvale and held that provisions in loan agreements for uplifting the interest rate for the future after a default should not be regarded as penalties, save where the uplift is evidently extravagant". What constitutes an evidently extravagant uplift was not defined. Colman J did not attempt to specify the upper limits of acceptable rates in the ***Lordsvale* case**. Even in the Cavendish case, the UK Supreme Court did not define what is extravagant, exorbitant and unconscionable. In ***Clyde case***, it was held that it is impossible to lay down any abstract rule as to what may or may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances of a particular case.

74. The Supreme Court of England and Wales in the case of ***Cavendish Square Holding BV v El Makdessi, ParkingEye Ltd v Beavis (supra)*** revisited the law on penalty rule after 100 years since the Dunlop case. Up until this case, the general principle was that a clause was a penalty if its primary purpose was to punish breach (i. e. that it was *in terrorem*) rather than to compensate the other party for its losses. Consequently, an alleged penalty clause could be defended on the basis that it constituted 'a genuine pre-estimate of loss' or liquidated damages'. The **Cavendish case** is the landmark decision on the law on penalty rule. The court faulted the four tests laid by Lord Dunedin in the ***Dunlop case*** for earning the status of quasi-statutory when that was not the intention. The Supreme Court also noted that the Dunlop test has been applied too rigidly, particularly in cases where there is a clear commercial justification for including a penalty clause or where there may be interests beyond the compensation which justify the imposition on a party in breach an additional financial burden. The Supreme Court thus found "deterrence" and "genuine pre-estimate of loss" as being unhelpful and that the test needed redefining hence it set out a new test for determining whether or not a contractual provision will be considered penal and therefore unenforceable. The new test is:

> *Whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.*

75. Lord Hodge on page 255 expanded on this test stating that the *"correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract"*.

76. It has been said that the test in the **Cavendish case** could be divided as follows:

    1. Has a primary obligation been breached which has triggered a secondary obligation?
    2. If so,

    i. is any legitimate business obligation protected by that secondary obligation? Or

    ii. does the secondary obligation impose an obligation that is extravagant, exorbitant or unconscionable?

    iii. The UK Supreme Court also referred to the importance of considering the circumstances in which the parties entered into the contract. The court stated the following:

    In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with consequences of breach.

77. The above cited foreign cases have been discussed in our local jurisdiction and applied or considered in various degrees in the few cases on penalty interest.

78. It is the Defendant's position that the cases are all High Court decisions which are not binding on this court just as the cited foreign cases. Our Supreme Court of Appeal is yet to make a decision on the matter. As will be observed below, the position in our local jurisdiction whether or not default/penalty interest rate is penal and therefore unenforceable is not yet settled. The respective Judges decided the cases before them as they deemed appropriate.

79. ***See Speedy's Ltd v Finance Bank Malawi Ltd [2001-2007] MLR (Com) 373.*** In this case in which the court was not called upon to determine

whether the additional interest to be charged on amounts in excess of overdraft was penal and therefore unenforceable, the court itself observed that it was *"customary for a bank to charge extra interest on amounts in excess of overdraft*". The court then opined that 1.5% was reasonable and awarded it.

80. It is this additional interest that has been the subject of litigation in this matter.
81. See ***Harry Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd Commercial Case Number 186 of 2015 (Unreported).*** In this case, loan agreements executed between the Plaintiff and the Defendant provided for interest at the Defendant's base lending rate then at 39 % per annum plus a margin of 5% making a total of 44%. On default, however, the rate would be increased by an additional 10%. The Plaintiff defaulted in repaying the loans. The total of the default interest collected by the Defendant was K56,864,112.90. The Plaintiff sued the Defendant to recover that sum contending that the default interest collected by the Defendant was a penalty and not a genuine pre-estimate of loss in that it was held in *terrorem* of the performance of the primary obligation to pay debt plus normal interest thereby rendering it void and unenforceable. The court in that case applied the cases of *Dunlop* and *Cavedish*. The court held that the 10% additional interest on default was penal and therefore unenforceable. The court found that the 10% was not a genuine covenanted pre-estimate of the actual damage to be suffered by the Defendant as a result of breach; rather that it was a penalty *in terrorem* of the primary obligation to pay the principal and interest on the due dates and therefore unenforceable; that the Defendant did not adduce sufficient evidence to show that there was a legitimate reason for the additional 10% interest on default in terms of the Plaintiff's increased risk on default; that 10% was extravagant compared to the gravest possible loss to be suffered by the Defendant on default.
82. The court in that case acknowledged that the penalty clause was not penalty merely because the clause so stated. The court was also quick to clarify that the decision was not a blanket authority that penalty/default interest is not recoverable as that would have been inconsistent with the authorities the Court had referred to and applied. In other words, it is not

a blanket authority that penalty/default interest is penal and therefore unenforceable. This is in sharp contrast to the decision in ***National Bank of Malawi v Lilongwe Gas Company Ltd Commercial 165 of 2016 (unreported)on and Coal Co)*** where the court in no uncertain words stated that any default interest or penalty interest at any rate is not commercially justifiable but pure punishment to the borrower to perform his primary contractual obligations.

83. See ***National Bank of Malawi v Lilongwe Gas Company Ltd Commerical Case Numbner 165 of 2016 (unreported).*** In this case, a loan agreement executed between the Plaintiff and the Defendant provided for interest at the Plaintiff's prevailing lending rate and K14,500.00 for every default. The Defendant defaulted in repaying the loan. Subsequently, the Plaintiff commenced the action claiming the sum of K31,424,072.42 plus 10% penalty interest on default. The Defendant admitted obtaining the loan but argued that he was not liable to pay penalty interest as the same was unenforceable. He took out a motion under **section 3 of the Loans Recovery Act** for the reopening of the loan transaction. The court found that the parties had not agreed that the Plaintiff would be entitled to penalty interest of 10% in the event of default. Rather, that the Plaintiff would charge the defendant K14,500.00 for every default. The court held that the agreed provision on payment of K14,500.00 in default was penal as the amount was additional to what the Plaintiff was entitled to and it was also the Defendant's secondary obligation to his primary obligation to pay under the contract. The court went on to hold that the Plaintiff had not adduced evidence to show that the provision was commercially justifiable at the time the contract was made. The court disagreed with the reasoning in Lordsvale case. The court stated that the UK Supreme Court in Cavedish case had serious misgivings about the test in the Lordsvale case. But as demonstrated above, the UK Supreme Court applied with approval the Lordsvale case, in particular on commercial justification. In fact, it is the very reason the court in Harry Gunda case said that holding that penalty interest is not recoverable would be inconsistent with the authorities it referred to. The court then held that any default interest or penalty interest at any rate is not commercially justifiable. That it is pure punishment to the borrower

to perform his primary contractual obligations. The court as submitted above disagreed with the Lordsvale case for not sounding legitimately convincing. Equally, the court did not agree with the Harry Gunda case on the acceptable rate of default /penalty interest.

The Court's Finding on Penalty Interest

84. I have considered all cases cited and others related to the issues at hand. I have paid much attention to the case of ***National Bank of Malawi v Lilongwe Gas Company Ltd Commercial Case Number 165 of 2016 (unreported) and Harry Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd Commercial Case Number 186 of 2015 (Unreported),*** among the many cases canvassed by both parties. My keen interest and persuasion from the above two cases is based on the fact that these are the two leading Malawian cases in which the issue of penalty interest have been extensively discussed by the Courts in Malawi. The rest of the are from England and other jurisdictions.
85. I distinguish the current case and the case of *National Bank* and the *Gunda case*, because unlike in the National Bank case, in the current case, the wording of the Contract between the parties clearly provides that "*such claims …will attract a penalty interest*". In the current case, there is no dispute regarding the construction of the contract, the nomenclature or its meaning. The Defendant has admitted that they charged Penalty interest because it was justified based on the risk profile of the Claimant.
86. The Defendant has justified their imposition of penalty interest. The Defendant's witnesses both testified and in cross-examination that the default/penalty interest rate was never intended to punish the Claimant as a Borrower. Rather, it was intended to compensate the Defendant for taking unknown and unmitigated risk on the Claimant. Refer to paragraph 9 of **GP** and paragraph 18 of **TM**. The Defendant through its witnesses also defended their use of 10% for the unmitigated risk instead of any other rate. However, my question is then, what is the unmitigated risk, when the Defendant had used the Claimants property as security for the same loans? I am of the view that by securing through a charge

or some form of security, the risk is to a great extent mitigated. The fact that after default in payment, the Defendant is now able to exercise their power of sale over the securities shows that the Defendant's precarious position has always been protected by the securities (properties Title Number Mapanga 99 and Nkolokoti 288 among other securities).

87. It is therefore my finding that the imposition of penalty interest on a secured debt is not commercially justifiable and it is unconscionable. *"Unconscionability"* refers not only to the unreasonable terms but to the behavior of the stronger party, which must be morally culpable or reprehensible, as the objectionable terms have been imposed on the weaker party in a reprehensible manner, **see *Irvani v Irvani* [2001] Lloyd's Rep.412.**
88. It is my finding that the Defendant cannot be compensated through the penalty interest and also be compensated through the holding of collaterals such as the securities placed over the properties of the Claimant at the same time. It is my further finding that the provision requiring the claimant to pay penalty interest is penal and unenforceable because the claimant's loans were already subjected to appropriate credit risk management measures which in turn mitigated any potential loss that the Defendants would suffer in the event of default. In the face of this being a secured loan in which the Defendant is holding security over the Claimant's properties, there was no need to sanction penalty interest, as reasonable efforts had already been taken to mitigate the unknown losses by the Defendant. In this case, the penalty interest clause was an excessive measure that created an additional and unnecessary burden on the Claimant. If the loans taken by the Claimant were none performing, then the Defendant ought to have moved in to exercise their power of sale over the securities. Rather than charging penalty interest and waiting for the Loan to balloon such that the Claimant is choked in debt, then move for the final kill by exercising the Power of sale over the securities. The Defendant clearly had no lawful reason to apply both.
89. The fact that it is an industry norm to charge penalty interest does not mean that it is appropriate to do so. Commonness does not confer legality, ***see Katsala J (as he was then)*** in ***National Bank of Malawi***

v Lilongwe Gas Company Ltd Commercial Case Number 165 of 2016 (unreported) in which the Court stated that:

> *"Thus I am in no doubt that the provision is penal. The argument that it is the practice in the banking industry to levy such penalties on borrowers who default on their loan repayments, in my view, does not change the true nature of the provision. Commonness does not confer legality. It remains penal, and as such, it is frowned upon by the Courts".*

90. Similar to the sentiments of **Katsala J**, I have not reached this decision without careful consideration of its impact on Banking practice in Malawi. It is a known fact that it is the business of banks to buy and sell money. However, such businesses should be done within the boundaries of the law. Contractual provisions must be legal, ***see the case of W v Commissioner of Taxes 5 MLR 135.*** Banks should not continue to impose penalty interest as it is punitive in nature. Imposing penalty interest provisions is an unfair contractual term, and therefore unconscionable.
91. So to answer the question ***whether the penalty interest charge is lawful warranting reopening of the transaction, in light of public policy, section 3 of the Loans Recovery Act, harsh and unconscionable or whether the penalty interest charge was fair compensation based on the Claimants risk profile.*** My finding is that penalty interest is not lawful and therefore this warrants the reopening of the transaction under section 3 of the Loans Recovery Act. It is my further finding that the penalty interest charge was unfair considering that the Claimants risk profile is more favourable as it was supported by the securities (properties Title Number Mapanga 99 and Nkolokoti 288 among other securities) which he surrendered to the Defendant to mitigate any potential risks for the Defendant in transacting with him.
92. Unconscionable conduct is also well discussed in both local and foreign case law. I also cite the case of ***Boustany v Piggot*** **(1995) 69 P. & C.R. 298** the Privy Council stated the following principles which were also adopted by the Court of Appeal in England in ***Irvani v Irvani*** **[2001] Lloyd's Rep.412:**

1. *There must be unconscionability in the sense that the objectionable terms have been imposed on the weaker party in a reprehensible manner;*
2. *"unconscionability" refers not only to the unreasonable terms but to the behavior of the stronger party, which must be morally culpable or reprehensible;*
3. *Unequal bargaining power or objectively unreasonable terms are no basis for interference in equality in the absence of unconscionable or extortionate abuse where, exceptionally and as a matter of common fairness, "it is unfair that the strong should be allowed to push the weak to the wall";*
4. *A contract will not be set aside as unconscionable in the absence of actual or constructive fraud or other unconscionable conduct; and*
5. *The weaker party must show unconscionable conduct, in that the stronger party took unconscientious advantage of the weaker party's disabling condition or circumstances.*

This case was cited by **Katsala J** as he was then, in the case of ***Engen Malawi V Beatrice Kachingwe Commercial Case Number 260 Of 2015 (Unreported).***

93. Much as both parties did not cite nor consider arguing the consumer protection provisions of the law in Malawi, it is worthwhile to consider that unconscionable conduct is an unfair trade practice that is prohibited by the Law in Malawi as well. ***see Section 43 (1) g of the Competition and Fair Trading Act*** which provides that:

> *"A person shall not in relation to a consumer engage in unconscionable conduct in carrying out trade in goods or services"*

See also ***Section 6(1) f of the Consumer Protection Act****, which provides that*

"(1) A supplier or trader of technology, goods or services shall not engage in any unfair trade practices".

94. The courts are willing to set aside a contract where it is shown that the other party engaged in unconscionable conduct or an unconscientious use of power, ***Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 All E.R. 303.***
95. The Claimant has managed to demonstrate that the application of penalty interest was unconscionable and it warrants the transaction to be re-opened under the Loans Recovery Act.
96. This Court will in subsequent paragraphs, make appropriate Orders to substitute the Penalty Interest charged by the Defendant.
97. I now move onto the next issue for consideration:

ii. **Whether the Defendant is entitled to the counterclaim of MK1,343,203,284.26 and all reliefs thereunder**

98. It is admitted by both parties that the Claimant is still indebted to the Defendant. However, the Defendant is claiming that his debt is MK1,343,203,284.26, whilst the Claimant is of the view that the debt is MK136,079,158.91. The Defendant has included penalty interest in his calculation, whereas the Claimant has removed penalty interest in their computation.
99. Based on my finding on the unlawfulness of penalty interest, it is my further finding that the Defendant is not entitled to the amount as pleaded in their counterclaim, in as far as the reliefs include the addition of penalty interest. The Defendant is therefore limited in their Counter-claim and reliefs, to restrict themselves to the amounts due, except for penalty interest.
100. I will move on to the next issue for determination:

iii. Whether the outstanding balance on the credit facilities is MK136,079,158.91 or MK1,343,203,284.26

101. Based on my finding on the unlawfulness of penalty interest, it is my further finding that the Defendant is not entitled to the amount as pleaded in their counterclaim as outstanding balance, in as far as the reliefs include the addition of penalty interest. The Defendant is

therefore limited in their Counter-claim and reliefs, to restrict themselves to the amounts due, with the exception of penalty interest. With regard to this finding, this court will Assess the actual amount outstanding during assessment proceedings so that both parties will have an opportunity to present their full computation of the amounts owed, with the exclusion of penalty interest.

102. I will now move on to the next issue.

iv. Whether the Defendant is entitled to realise (sell) the securities following failure by the Claimant to pay the outstanding balance

103. With regards to this issue, the Defendant has shown their determination to exercise their power of sale over the securities properties Title Number Mapanga 99 and Nkolokoti 288 among other securities. However, it is my finding that it is premature at this stage to conclude that the Claimant has failed to pay the outstanding balance. This is because the application of penalty interest has provided an inaccurate figure to be sanctioned as the outstanding balance. The inaccuracy is arising out of the application of the penalty interest charge.

104. It is therefore my finding, and directions, that the Defendant is entitled to realise (sell) his securities (properties Title Number Mapanga 99 and Nkolokoti 288 among other securities) only if the Claimant fails to pay the outstanding balance 30 days after the court issues an Order of assessment of the amount owed.

105. I will move onto the next issue for determination.

***vi.* Whether the Claimant is entitled to the claims in the Statement of Case**

106. It is my finding that the Claimant is entitled in part to the claims in the statement of case because he has successfully argued the critical heads of arguments that have a bearing on the final outcome of the case. However, the Claimant is entitled to what this Court will Order in the next paragraphs.

RULING

107. In conclusion, therefore, the Claimant has been successful in some but not all the substantive heads of arguments.
108. It is my finding that the Defendant is liable to rectify the computation and only after they have not been paid their amounts owed by the Claimant, should they move in on the securities.

ORDER

109. It is ordered that the Claim is successful in part.
110. The Counter-claim is not successful in full, pending assessment and payment of amounts due to the Defendant. The counter-claim has only been dismissed to the extent of the Penalty interest, however, part of the Counter-claim is lawful.
111. It is further Ordered that each party pays its own costs as it is fair that each party bears its own costs. In the same vain, I will not award the Defendant debt collection costs as pleaded as the Claim lacks merit, see ***Perfecto Pest Control (PVT) Ltd vs- Malawi Leaf Company Limited, Civil Cause No. 261 of 2012***, see also ***J.L. Kankhwangwa and Others –vs- Liquidator Import and Export (MW) Limited, M.S.C.A. Civil Appeal Number 4 of 2009***.
112. The assessment of the amount owed by the Claimant shall be done by the Assistant Registrar within 30 days of this Judgement.
113. The Claimant shall pay all the amounts assessed within 30 days of the Order of Assessment.
114. Should the Claimant fail to pay the assessed amount in full within the stipulated period, the Defendant shall proceed to exercise its power of sale over the securities held.
115. Should the parties opt to compute jointly the amount owed by the Claimant, both parties can settle the amount through an agreed Order which should be filed with this Court within 30 days of this Order.

Pronounced in Open Court in Blantyre this 7th day of December 2023

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Charlotte Wezi Mesikano Malonda

JUDGE