REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CAUSE NUMBER 426 OF 2022

(Before Honourable Justice Manda)

BETWEEN

DALITSO GENERAL SUPPLIERS LIMITED.....CLAIMANT

AND

MYBUCKS BANKING CORPORATION LIMITED.....DEFENDANT

CORAM: Manda, J

Gondwe C, Counsel for the Claimant

Kachere E, Counsel for the Defendant

RULING

This was the defendant's application for discharge of an injunction, which this court granted to the claimant.

The facts of this matter are not really in dispute. The claimant herein applied for, and was given, a working capital loan facility of K1,300,000,000.00 and K800,000,000.00 as an overdraft. The said facilities were secured by two properties, namely Title number 6/187 situated in Area 6 in the City of Lilongwe and 31/2/1 situated in Kamphata in rural Lilongwe. It needs to be mentioned that Title number 31/2/1 has a filling station built thereon.

The facts before this court are that at the time of the application for the said facilities, the claimant indicated to the defendant that Area 6/187 comprised of several structures thereon. The claimant did not indicate to the defendant that the said plot had been subdivided into two title numbers.

Based on the information provided by the claimant to the defendant, the defendant proceeded to grant the sought facilities to the claimant. It is only after these

facilities had been given to the claimant that it was revealed that the claimant created another title number on plot number Area 6/187, to create plot number 6/188. Suffice to say that 6/187 and 6/188 appear to be on the very same plot. The claimant then obtained yet another loan facility from National Bank of Malawi using Plot number 6/188. The defendant alleges that the conduct of the claimant in altering title numbers is criminal in nature, hence the claimant is guilty of misrepresentation in this regard.

The evidence before this court is that the claimant defaulted on his repayment of the loan with the defendant several times. The defendant engaged the claimant on numerous occasions in an effort to assist the claimant to clear the facilities. The claimant made several undertakings to clear the loan facilities for some years. The claimant has not made any payment.

It is in evidence that during the latest discussions, the claimant paid, through cheque, an amount of K150,000,000.00 as part payment. The said cheque has been returned to drawer. In other words, the cheque bounced.

It was the defendant's contention that if the court takes into account the facts as narrated above, it means that the claimant has failed to repay to the defendant.

Further, the defendant stated that after numerous attempts to assist the claimant in the repayment schedules, the claimant failed to make payments, leading to the defendant issuing a statutory demand notice of 90 days as required by section 68 of the Registered Land Act. In the sworn statement of Mr Loti Nyasulu on behalf of the defendant, the statutory demand notice dated 13th July, 2022 was exhibited as "LN3".

Thereafter, the parties went into further negotiations in which the claimant would clear all arrears by 31st August, 2022, whereafter it would resume normal repayment. It was then agreed that upon any failure by the claimant to pay as agreed, the defendant would be entitled to sell the securities pledged and that the legal statutory notice would not be suspended as a result of the agreement.

According to the defendant, the 90 days' notice expired without the claimant making any payment. After this, the defendant then engaged the Land Registrar of Lilongwe Land Registry, in compliance with section 71 of the Registered Land Act, for confirmation of a reserve price for the property numbered Nathenje 31/2/1, which Registrar confirmed a reserve price of K553,350,000.00. It was also deponed that the defendant then started the processes to sell the security in Nathenje.

It is after the defendant put the security on sale that the claimant came to this court seeking an order of injunction restraining the defendant from proceeding

with the sale of the properties. The court granted the injunction ex parte, which the defendant now applies to the court for its discharge.

The claimant, on the other hand, also filed its sworn statement. The claimant admitted to entering into a loan and overdraft agreement with the defendant for the sum of MK800,000,000.00 as the sanctioned limit under the overdraft agreement. Both loan and the overdraft facilities were to be secured by property title number Bwaila 6/187 according to the claimant.

It is deponed by the claimant that it is wrong for the defendant to suggest before the court that there was misrepresentation as the defendant inspected the secured property in issue against documents at the Lands Registry before offering the loan facilities to them. The claimant states that the defendant bank's Credit Department exercised all the due diligence over the secured property before creating a charge on it.

The claimant depones that the fact that the other parts of the land in question were under different titles was communicated to the defendant. That the title documents that were presented to the defendant bank borne title number Bwaila 6/188 and the loan was offered based on this. The claimant further stated that the loan facilities were also secured by property title number Nathenje 31/2/1 in Lilongwe which has a filling station.

The claimant depones that it was not served the statutory demand notice by the defendant herein. It is further stated that the claimant has no knowledge of the terms restructuring the repayment terms of the loan as the same was not served on them. The claimant continues to state that it was never agreed between the parties that the mode of service of documents was to be by email.

It is deponed that the claimant has been honouring and complying with the terms of the loan facility agreement since it came into force, but that the claimant faced some challenges for the past months of the year which made them unable to make repayments towards the defendant bank. The claimant depones to the fact that its overdraft facility has exceeded the agreed limits with a sum of MK250,000,000.00. It is maintained by the claimant that it is their intention to clear the arrears.

The claimant stated that the defendant bank proceeded to advertise the secured properties without hearing from the claimant on how he intends to redeem the property in issue. It is said that the defendant instructed a valuer, Messrs T.G Msonda & Associates to value the property when advertisements for the sale of the property were also published in newspapers.

According to the claimant, if the defendant bank proceeds to sell the properties securing the facilities herein, the claimant will suffer irreparable damage to do with reputational damage as the properties in issue are unique business entities. That the defendant bank should have given them reasonable time before recalling the collaterals because the property in issue is real property and they had to comply with several regulatory requirements for the filling station business.

The claimant then went on to reiterate that it was not served with the statutory demand notice as email was not agreed as the mode of service and as such it is irregular and illegal for the defendant to proceed with the sale of the properties. It is said that this takes away the claimant's right to redeem the properties in issue. Further that, the defendant bank should have come up with a final sale price after valuation and should have engaged the claimant to redeem the property at the said price. In the claimant's view, damages may not be enough to compensate the claimant in the event that the defendant proceeds with the sale herein.

The claimant states that it is ready and committed to clear the arrears in a three months' period of a statutory demand notice and that in the circumstances there is no basis for the defendant bank to proceed with the sale. It is said that the claimant will be paying the monthly instalments after clearing the arrears. That the claimant did not suppress any material facts in relation to this matter. It is deponed further that the defendant bank has not been open and frank in relation to the loan facility including the issue of reserve price from the Lands Registrar.

The Law

The present application concerns an interlocutory order of injunction. The legal principles that govern the grant of interlocutory injunctions are enunciated in the case of ***American Cyanamid Co. v. Ethicon Ltd.*** [1975] AC 396. Mainly, there are three basic principles that are as follows:

a) There is a serious question to be tried;
b) Damages may not be an adequate remedy; and
c) Balance of convenience favour grant of order of injunction

This is also encapsulated under Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR, 2017), which provides as follows:

> *"The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-*
> *(a) there is a serious question to be tried;*
> *(b) damages may not be an adequate remedy; and*
> *(c) it shall be just to do so,*

and the order may be made unconditionally or on such terms or conditions as the Court considers just."

Both parties in this matter have, correctly in our view, cited several cases that deal with the discharge of interlocutory injunctions, and, for clarity of this Ruling, we shall refer to those cases in this Ruling.

An interlocutory injunction will only be granted where the applicant has made out a 'good and arguable claim to the right he seeks to protect'- ***Total Malawi Limited v. Jimmy Mbuliro, Trust Auctioneers & Estate Agents, Realism***

This court has powers to discharge, upon valid ground, an order of interlocutory injunction. As stated in ***The State v. The Malawi Communications Regulatory Authority ex – parte: Joy Radio Limited*** Civil Cause Number 143 of 2008

"The court is vested with powers to discharge an order of interlocutory injunction. The law is that an injunction granted ex parte may on sufficiently cogent grounds be discharged or vacated or waived on an application itself made ex–parte"

See also ***London City Agency (JDC) Ltd V Lee*** [1970] Ch. 597, in which it was held as follows:

"In my judgment the court has ample jurisdiction to make such an order, and there is no established rule of practice to prevent the court doing so in a proper case. Furthermore, the law is that if on the hearing of motion by a plaintiff for an injunction or in the alternative, to continue interim injunction already obtained ex – parte, it appears that the interim order was irregularly obtained, by suppression of facts the court may discharge the ex – parte order without any cross notice of motion for that purpose by the defendant."

In ***B M Kasema V National Bank of Malawi*** Civil Cause Number 229 of 2001 by Mwaungulu J. elaborately expounded this issue in the following manner:

"The court has wide powers particularly with ex – parte interlocutory injunctions to discharge, vary or vacate an interlocutory injunction. This magnanimity does not extend to interlocutory injunctions obtained inter – parties. The defendant in that scenario should appeal. The case of ***London Underground Ltd V National Union of Railway-men*** *is the authority, if that is necessary. This court will vary, waive or vacate injunctions obtained ex – parte. It does so on several grounds, some*

raised by the defendant's counsel. Generally, the court dissolves ex – parte injunctions obtained when facts are suppressed to the court."

In ***The State v Malawi Communications Regulatory Authority, ex parte Joy Radio Limited,*** it was pronounced as follows:

"The law is that where there is suppression of material facts by the plaintiff, the court has power to discharge the injunction so obtained on the defendant's prayer for a discharge...

Thus, the law requires that where the ex – parte applicant obtains or is granted an order of injunction, there must be full and frank disclosure of all material facts otherwise as was held in ***Phiri v Indefund*** *the order of injunction may be set aside without having regard to the merits of the case at hand. This is so, and in my view, the rationale of the requirement is not difficult to see because the remedy of an injunction is an equitable remedy and the principle is therefore that he who seeks the aid of equity must do so with clean hands. In ex – parte applications, the principle of* ***'utmost good faith'*** *applies. The party coming to court must therefore make full and frank disclosure of all material facts. Thus, as it was stated by Chitty J, as he then was, in* ***Schmitten V Faulkers*** *that the ex – parte applicant must proceed 'with the highest good faith'."*

See also ***Beese v Woodhouse*** [1907] 1 WLR 531 where the very same sentiments were highlighted.

When it comes to statute, a chargee has remedies against a defaulting chargor provided under section 68 of the Registered Land Act;

68.*—(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.*

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may—

(a) appoint a receiver of the income of the charged property; or
(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months

of the date of service, with a further notice served on him under that subsection.

The Registered Land Act, in section 71(1), expressly provides for the duty of a chargee who intends to exercise the power of sale of charged property as follows;

71.— (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the Registrar may approve, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby.

Analysis

The question to be determined under this is whether there are sufficiently cogent grounds for the injunction that was granted to the claimant to be discharged. One such ground is where the requirements for grant of injunction enunciated under Order 10, rule 27 and in the ***American Cyanamid*** case do not support continuation of the order of the injunction.

Is there a serious question to be tried?

There is no contention that the claimant obtained loan and overdraft facilities from the defendant bank. It is also not contended that the claimant has ever since fallen into arrears as regards instalments for repayment of the facilities. The claimant admits exceeding the sanctioned limit on the overdraft facility by a sum of about MK250,000,000.00. It is this situation that prompted the defendant bank to commence sale proceedings of the secured properties pursuant to its rights under section 68 of the Registered Land Act as a chargee.

The claimant contends that the statutory demand notice being referred to by the defendant bank herein was never served on them because service of the documents was not agreed to be by email. The defendant bank however submits that correspondence between the claimant and the bank was mostly being done through email. The claimant has not controverted the defendant's statement that the same statutory demand notice they claim to not have been served was the subject of discussions that happened on 18th July, 2022. It is not right for the claimant to come out now and say that electronic mail was never an agreed mode of service when this was a mode which was being used for communications to do with the loan.

The claimant depones that the restructuring terms being referred to by the defendant were imposed on it, but the court has not been satisfied with evidence how this was an imposition. The claimant agreed to repay all the outstanding arrears by 31st August, 2022 in the said terms and that thereafter in the month of September, 2022 he would resume making the monthly instalments. It was stipulated in the said terms that the statutory demand notice dated 13th July, 2022 would not be suspended as the result of this subsequent agreement. The result is that the claimant failed to honour these terms, and the defendant was left with no choice but to pursue its remedy under section 68 of the Registered Land Act to recall the secured properties.

In the circumstances, the claimant was given ample chances by the defendant to repay the outstanding arrears and continue with the agreed monthly instalments. Ample time was also given to the claimant to redeem the secured properties under the statutory demand notice which was issued on 13th July, 2022. The defendant is within its rights to recall the secured properties pursuant to the clear terms of the original loan agreement and the subsequent terms restructuring the repayment of the loan facility.

The claimant sought to submit before the court that it is committed to clear the outstanding balances on the loan facilities with the defendant bank and stated before the court that they had issued out cheques to the tune of MK150,000,000.00 towards the defendant bank to reduce the loan balances. Responding to this, the defendant bank filed a supplementary sworn statement stating that the said cheques had been returned to drawer. They bounced. This instance ran counter the commitment that the claimant wanted to demonstrate before the court as regards its ability to liquidate the loan facilities after they have fallen due. It is not surprising that the defendant bank finds it hard to continue to accommodate the claimant's excuses further on the loan facilities, especially with the fact that the last cheques have bounced. It becomes extremely difficult for the court to assist the claimant in these circumstances. The claimant went ahead to issue cheques of huge amounts to the defendant with knowledge that its accounts would not contain such amounts on the due date. Further, there is no evidence before the court that the claimant advised the defendant not to deposit the cheques when the time for deposit came. We find this conduct by the claimant wanting.

In view of this, this court is of the view that the claimant has failed to raise a serious issue that needs to be tried which means they have failed to prove first limb of the test in the American Cyanide case.

Whether damages are an adequate remedy

The claimant contended that damages cannot be adequate remedy herein because the damage to be suffered relates to 'reputational damage' as the properties in issue are unique business entities. This court adopts the statement by the court in the case of ***Mkhuzo Chirwa v. Express Microloan Limited*** Commercial Cause No. 371 of 2022 which, when faced with an argument such as the one advanced by the claimant herein, stated that the claimant ought to have known the consequences of his actions and should never have put himself in such a situation. The claimant had been given all chances to show commitment towards liquidation of the loan evidenced by the subsequent restructured terms made to allow him to reduce the liability. He failed. A commitment is made that MK150,000,000.00 would be paid to the defendant bank, and the cheques get returned for lack of funds. Clearly, the claimant is in no financial position to liquidate the loan facilities and it would be unreasonable to restrain the bank from exercising its right under the law as a chargee in light of all these circumstances that have qualified them to do so. The problem created here is that the claimant is still "keeping" the money borrowed from the bank as well as the security which is to the detriment of the defendant.

Damages, if any, shall be adequate to compensate the claimant should it happen that the it emerges successful at the main trial. The defendant bank's financial capacity to pay the damages cannot be doubted. In light of this, the claimant has failed to show that damages would be inadequate remedy.

Balance of convenience

Under this head, the test is whether the comparative mischief, hardship or the inconvenience which is likely to be caused to the applicant by refusing injunction will be greater than that which is likely to be caused to the opposite party by granting it (See ***Yogesh Agarwal v. Sri Rajendra Govel*** 2014 (3) ARC 427).

The claimant herein got and enjoyed the loan and the overdraft facilities obtained from the defendant bank. The promise in return was only that the claimant would be repaying particular instalments and would remain within sanctioned limit of the overdraft facility. As it is, the defendant bank has been denied its dues under the loan agreement and no doubt this is causing hardship and inconvenience to them as a money lending institution which relies on faithful borrowers who will repay the money in good time so that it can be lent somewhere else at a profit. Huge amounts of money are involved in this matter and the risk is also intensified with a debtor who appears to have no means of repaying in reasonable time. It is,

therefore, the considered view of this court that the defendant bank should be spared this inconvenience, hardship and mischief which will result if the injunction is upheld. The claimant cannot be allowed to keep both the money and securities. It is just not fair to the defendant. The balance of convenience, therefore, leans toward discharging of this order of injunction.

Bad faith when obtaining order of injunction

The core and settled principle is that good faith must be demonstrated through and through in the making of the application for an interlocutory order of injunction, itself being an equitable relief. It need not be tainted with bad faith.

The defendant bank herein has deponed that the claimant misrepresented before the court regarding the true security and the facts surrounding the statutory demand notice. The parties agree that the title presented by the claimant to the defendant bank was for Bwaila 6/187. The defendant was impressed that this was for an entire plot existing on the land in question, when in true fact it only applied to just a part of the whole plot.

The claimant is right, in view of this court, to say that the defendant bank must have exercised all due diligence when the securities were being created. However, the facts before me are that the bank duly did a due diligence. The alteration of the plot numbers occurred after the actual transaction. As such, one cannot expect the defendant to have known of the existence of two titles on one plot. It is just not possible. This court does not think that if the defendant had known of the existence of two plot numbers on one plot, it would have advanced the facilities to the claimant.

As found above, the claimant must have had knowledge of the statutory demand notice that was issued by the defendant bank. It appears that the claimant tried to act clever now that the issue got to these levels, by denying the mode of communication that has been in use during the subsistence of the loan agreement. This cannot be said to have been done in good faith. If anything, the claimant should have appraised the court of this fact during its application noting the statutory demand notice however irregular they might have labelled it. But here was a clear misstatement as to the existence of the statutory demand notice.

The bad faith thinly veiled by these contentions by the claimant is inconsistent with the remedy of an injunction and this court discharges the interlocutory order of the injunction that was granted to the claimant on this ground too.

Furthermore, it is in the court's knowledge now that the defendant duly obtained a reserve price for Nathenje 31/2/1 from the Land Registrar for Lilongwe Land Registry. This was done in accordance with the dictates of the law. The defendant

cannot thus be faulted on this step taken. What was remaining was to do the same on Title Number 6/187. As such the defendant is acting within the law.

Conclusion

In conclusion, the court is of the considered view that in the circumstances surrounding this matter, it is just and fair to discharge the injunction which we granted to the claimant. Sustaining the injunction would be, in the premises, prejudicial and detrimental to the defendant. This should be the position since the facilities are secured by real property. The defendant should be allowed to call in the securities to recover its money as agreed in the instruments that were used when the loan and overdraft facilities were obtained. The statutory notice on Nathenje 31/2/1 issued by the defendant is still valid and can be enforced. The defendant is also at liberty to issue a statutory notice on 6/187. It is so ordered.

Costs

It is trite law that costs follow the event. In this matter, the defendant has been successful in its application to discharge the injunction. As such, costs are for the defendant, to be assessed if not agreed by the parties within 21 days from the date of this Ruling.

Made in Chambers this.....27th.....day of.....January.....2023.

K.T. MANDA
JUDGE