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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Civil Cause No. 307 OF 2007

Between:

**BEATRICE MULAUI (as personal representative and
Administratrix of M.J. MULAUI)**

PLAINTIFF

And

ESCOM LIMITED

DEFENDANT

Coram : CC MATAPA KACHECHE Assistant Registrar
E Banda Counsel for the plaintiff
Kambauwa Counsel for the Defendant

ORDER ON ASSESSMENT OF DAMAGES

1. The plaintiff commenced this action in her capacity as the administratrix of the estate of MJ Mulauzi (deceased).
2. Before his demise the deceased used to carry on restaurant and rest house businesses at Mangochi Boma.
3. The defendant, the sole supplier of electricity in the country, used to supply electricity to the business premises under account number 10043444. Meter number 57110 was installed on the premises. The plaintiff carried on the deceased's business upon his demise.
4. According to the plaintiff, the premises used to consume around 1000 units of electricity per month and rarely incurred bills in excess of K4, 000.00 per month. However while she so kept her consumption to the minimum, the defendant through its agents or servants started sending wrong bills to the plaintiff. The bills, though quoting the correct account number were quoting the wrong meter number.
5. The wrong bills were higher than the normal consumption for the plaintiff. On or about 17th May, 2005 the defendant posted, to the plaintiff's account, a consumption of 28, 070 units costing K172, 830.29. According to the plaintiff in that month she had consumed the usual amount she had been consuming all along.
6. Although the plaintiff tried to resolve the issue with the defendant both through its branch office at Mangochi and through its headquarters, the defendant did not heed the plaintiff's complaint. Instead the defendant demanded that the plaintiff do clear the bill or face disconnection. Indeed the defendant carried out its threat when the plaintiff failed to clear the bill in good time.

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7. The plaintiff was then forced to negotiate payment terms with the defendant just to have the defendant reconnect the electricity. Whereas the plaintiff tried to keep to her part of the agreement the defendant kept on disconnecting the plaintiff until she commenced the action herein.
8. According to the plaintiff the conduct of the defendant has caused her loss: the plaintiff had to use charcoal and firewood to cook in the restaurant instead of electricity. This affected her business in that cooking on firewood or charcoal is cumbersome and slow thereby leading to lower production of food and snacks. Apart from the slowness she had to suspend production of certain foods and snacks altogether, particularly those that are sensitive to smoke such as cakes, and those dependent on electricity for production such as ice cream.
9. The plaintiff's business environment was also affected in that she could not provide fans and light during night time. Her business was therefore restricted to day time before dusk. Her rest house business was completely killed off as people could obviously not patronize a dark rest house and, with it, went a portion of her restaurant customers as some resthouse customers used to buy food at the restaurant.
10. The plaintiff therefore claimed damages for breach of statutory duty; refund of the sums she wrongfully paid towards the clearing of the bills plus interest; damages for injurious falsehood and slander; damages for deprivation or loss of business and loss of profits. She also claimed costs of the action.
11. The defendant defended the action but ended up being found liable as a result of the striking out of the defence for non-compliance with mandatory mediation rules and for the defence lacking merit. The judgment was for unliquidated damages. The matter was therefore set down for assessment of damages. The first hearing was on 9th July 2015. The plaintiff was the sole witness on her own behalf.

The Law and Determination

12. The principle is that the Court must, as nearly as possible, order an amount, as far as money can, which will put the plaintiff in the same position she would have been in if she had not sustained the wrong for which she is being compensated- per Earl Jowitt in *British Transport Commission v Gourley*[1956] AC 185. This principle has been endorsed in the High Court in this country and it has been said that it guides the court in coming up with a fair estimation of the damages- per Ndovi J in *Makala v Attorney General*[1998] MLR 187 (HC).
13. It must be stated however that the plaintiff has a duty to mitigate any loss that might occur due to the wrong. The principle was stated by Viscount Haldane in the leading case of *British Westinghouse Co. v Underground Ry* [1912] AC 673 at 689 where he said:

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"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach...."

14. Damages for loss of profits are special damages and as such must be specifically pleaded and particularized and, of course, proved. The measure is based on the nature of business and the general return there from. (See *Namandwa v. Tennet & Sons* 10 MLR 383 applying *Barrows Engr. Ltd v. Njewa*, **Supreme Court of Appeal, Civil Cause No. 7 of 1981, unreported, at p.386**).

Analysis of Evidence

15. The testimony for the plaintiff, though reduced to a witness statement, was not systematically presented thereby making it very difficult to follow. As we will see later the plaintiff's testimony was presented in a confused manner thereby making it difficult to fairly assess the damages herein.
16. The plaintiff testified that she had tried to amicably resolve the issue with the defendant by, among other things bringing to its agents' attention the disparity between the account number and the meter number. In cross-examination the plaintiff was adamant in stating that the defendant was not willing to yield up to its mistakes and rectify the same insisting the plaintiff could not ask questions but pay for the bill as presented for it represented her consumption of the electricity.
17. To illustrate that the defendant was billing her using wrong meter readings she presented a bill for the month of July 2005 payable by 8th August 2005. Quoting the correct account number, the bill referred to a wrong meter number 81159. She goes on to say that is how she was being billed all along. The correct meter number should have been 57110.
18. Now, my observation is that both the plaintiff and the defendant had it wrong in the manner they handled the evidence during assessment. Much of the evidence that they brought would have been perfect for purposes of establishing liability rather than assessing the quantum of damages.
19. I make this observation because the issue of liability had already been settled, as such there was no need for the plaintiff to begin stating how the bills were blotted and how it was wrong meter numbers that had their bills posted to her account. In my view it would have sufficed if the plaintiff only stated that, as a result of the blotted bills she had failed to pay, or struggled to pay; that she approached ESCOM for a number of times; stating how many times she did that; that the power was disconnected and for how long it was so disconnected.
20. My second observation shows clearly how the whole testimony was messed up. The plaintiff was confused as to which of the two accounts she had with the defendant she was pursuing the action on. The whole case, as seen from the statement of claim is based on the wrong billing of account number 10043444 whose owner was MJ Mulauzi and its meter number was 57110. However the details in the witness statement are clearly in respect of

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account number 10079031 for JA Mussa whose meter number is 138902. I do not know how the issue related to this account came into contention deserving mention in the testimony of the plaintiff.

21. Indeed the plaintiff stated in cross-examination that the account number 10043444 had started having problems in 1997 and not in 2005. If we look at the balance sheet printouts [one exhibited by the plaintiff and the other by the defendant] it is clear that it is account number 10079031 that began experiencing problems in 2005, specifically on the first of May. On that day 28070 units were recorded against this account and were billed at K172, 830.29. Prior to this, the bills never went beyond K500.00 and, to agree with the defence witness, the balance sheet does not give an impression that the meter was actually been read prior to this date. I am fortified in my understanding by the fact that the columns for "READING" and "CONSUMP" do not have any figures from January 2003 up to first May 2005. On the contrary account number 10043444 seems to have been perpetually in huge debt. It does not even give me the impression that there was any consumption of electricity in respect of this account prior to 1st April, 2006 as the columns for "READING" and "CONSUMP" do not have any figures from December 2004 up to 1st April, 2006. The balance sheet starts from 1st December, 2004 so I cannot tell what happened prior to that date.
22. As if this is not enough the plaintiff did not state which account belonged to which business premises. Although an issue was not raised by the defendant with this anomaly, I should point it out that it was very important to the plaintiff's case to distinguish the premises to which each account related. Is it that both accounts related to the supply to the same premises? On the evidence there is nothing to show thus. If the accounts were in respect of the supply to different premises then she should have explained how the different businesses were affected on the basis of each account.
23. As it came out the testimony was without specifics as to what happened in respect to each account. In the end the plaintiff managed to confuse herself, the defendant and the Court. I am of the view that if she had concentrated on one account number, or had it been that she had separated the claims, we would have had less trouble and she would easily have proved her case. Alas that was not what she did.
24. It was amid this confusion that the Court entered a judgment in respect of account number 10043444 when, in my view the claim and, subsequently, the judgment should have been in respect of account number 10079031.
25. The third observation is that although it seems the plaintiff intended to pursue claims on both accounts she did not amend the statement of claim to reflect this desire. The end result is that she ended up confusing all of us in the exercise of assessment. I only began noticing this anomaly when the defendant brought its witness. Otherwise my initial impression was that we had been dealing with one account.
26. From now on I will concentrate on the issues regarding account number 10043444. The plaintiff claimed that electricity was disconnected from this account for a continuous period

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of 8 years. The plaintiff, in cross-examination stated that she began having problems with the account in the year 1997 but that it was actually disconnected in 2005. She went on to say that she was not reconnected until 2013.

27. Now this is an exaggeration. I do not know if the plaintiff was confused as to the dates due to the cross-examination or she wanted to deliberately mislead this court. First of all both the statement of claim and the witness statement do not refer to the date or period when electricity was disconnected. It was only when she was cross-examined that she attempted to recall as to when the electricity was disconnected. This obviously leads to a situation where it would be difficult to calculate the period when the plaintiff's premises did not have electricity. Secondly even at cross-examination she seems not to know exactly what she is saying. I must point out that the plaintiff impressed me as an intelligent person who could not easily fail to remember dates or periods within which events took place. But here I was disappointed.
28. Her case could not be helped either when she was forced to admit that there were times within the eight year period that electricity was connected and disconnected on and off. At the same she denied that on certain dates electricity was actually connected as the debtors ledger report indicated.
29. However looking at the evidence as a whole it seems to me that the electricity was disconnected sometime in August, 2005. There were on and off reconnections from this time up to January, 2008 when the electricity was permanently reconnected after mediation following the commencement of this action. This is clearly acknowledged by the plaintiff through her counsel as shown in exhibit "D 1" and "D 2".
30. The total period is two years and five months. I will reduce the period by 2 months. I must point out that this reduction is incapable of being verified on the evidence available but as I pointed out earlier the plaintiff did acknowledge that at times the electricity was being reconnected on and off. It would therefore be unfair to penalize the defendant for total loss during the period. The actual period in which the plaintiff was wrongfully deprived of the electricity was therefore two years and three months.
31. The plaintiff says she used to make a gross of K7, 000.00 per day from the rest house business as it was always fully booked. There was no much challenge to the plaintiff's testimony on this point although she failed to account for taxes which are obviously payable on such a huge income. But in the absence of any contrary evidence I will not penalize the plaintiff in any way. This translates to K2, 555, 000 per year. She used to pay her workers wages amounting to K1, 200, 000.00 per year. Her net income for the year therefore amounted to K1, 355, 000.00. I will thus award this amount for a period of 2 ¼ years. The total comes to K3, 648, 700.00.
32. The plaintiff said she used to make between K12, 000.00 to K15, 000.00 per day from the restaurant and snack businesses. The takings reduced to about K3, 000.00 to K5, 000.00 thereby making losses of about K9, 000.00 to K10, 000.00 per day. For the reasons given

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above I will award K9,000.00 per day as there was no contrary evidence given. The total for the period comes to 7, 391, 250.00.

33. Coming to the claim for slander the plaintiff claims that by its conduct the defendant presented to the public that she is a dishonest person who could not pay her bills. As a result the public began to shun her and her businesses thereby leading to the loss of her businesses.
34. In claims for slander the plaintiff ought to show actual damage to her character as a result of the defendant's presentation. In this case the plaintiff managed only to show that the conduct of the defendant affected her business in that her customers stopped coming to patronize her rest house for lack of electricity and not because they had negative view of her personality due to the defendant's conduct. Indeed from her testimony it is clear that her restaurant customers remained despite the disconnection. It was only her reduced capacity that probably led the customers, especially those looking for products no longer available in the plaintiff's restaurant, to go elsewhere.
35. In the circumstances, I can only award a nominal K100, 000.00.
36. Coming to the claim for the amount wrongfully paid to settle the bills: my calculations from the account come to K169, 520.00. I award this sum.
37. On the issue of interest on this sum I direct that a proper assessment of interest do take place and it accrues from January 2008.
38. The total award therefore comes to K11, 309, 470.00 plus interest on the K169, 520.00.
39. I order that costs of these proceedings be for the plaintiff.
40. Since the defendant is not present for the delivery of this order I further order the defendant should pay the award within 21 days after which the plaintiff shall be entitled to execute.

Delivered this 27th day of May 2017



CC Matapa Kacheche
Assistant Registrar