



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO. 587 OF 2019**

BETWEEN

LOYCE MISHECK CLAIMANT

AND

THE ATTORNEY GENERAL DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Zimba, Counsel for the Claimant

Mr. Ngaunje, Counsel for the Defendant

Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my Ruling on an application by the Defendant for an order dismissing the Application for Assessment of Damages on the basis that the Claimant executed a Discharge in favour of Government. The application is brought under Order 10(3), (5) and (8), of the Courts (High Court) (Civil Procedure) Rules and the court's inherent jurisdiction.

The application is supported by the following statement, sworn by Mr. Duncan Zikagwa, Senior State Advocate:

- "3. *THAT in January 2015, the Claimant commenced the present proceeding claiming damages for breach of promise or undertaking by the then State Vice President, Dr. Joyce Banda to give her a 2-tonner lorry and two fridges.*
4. *THAT on 10th June 2019 the Claimant obtained judgment against the Defendant following the Defendant's failure to attend mediation.*

5. *THAT the parties engaged in a series of negotiations on the payment of the judgment debt and a compromise was reached that the Defendant pays the Claimant a total sum of MK7,478,000.00.*
6. *THAT on 4th May 2021 the Defendant paid the Claimant the sum of MK7,478,000.00 through government cheque number 000168 issued on 19 April 2021.*
7. *THAT the parties duly executed and the Claimant signed a Release and Discharge agreement exonerating the Defendant from any claims against the Malawi government in respect of the claim including those the Claimant did not know. A copy of the said discharge is exhibited as "DZI"*
8. *THAT I verily believe that the Claimant herein, having executed a Discharge in favour of Government has no legitimate claim against Government."*

It is expedient that the wording of the Release and Discharge Agreement be quoted in full:

"This Release and Discharge Agreement is executed between the ATTORNEY GENERAL of care of Ministry of Justice, Private Bag 333 Capital City Lilongwe 3 acting for and on behalf of the GOVERNMENT OF THE REPUBLIC OF MALAWI (hereinafter the 'MALAWI GOVERNMENT') and LOYCE MISHEKI of P. O. Box 33, Madisi, Dowa on her own behalf (hereinafter the 'Claimant'), as of the last date indicated below upon which it has been executed by both parties.

This Agreement is made with reference to the following facts:

- A. *The Claimant sued for damages for personal injury and costs of the action against MALAWI GOVERNMENT [OFFICE OF THE FORMER PRESIDENT) for payment of outstanding balances emanating from a promise that the former President made to the claimant for payment of a sum (herein referred to as the CLAIM.*
- B. *Pursuant to the same, the Defendant accepted liability and agreed that it owes the Claimant the sum of MK7,478,000.00 as total amount for the CLAIM.*
- C. *MALAWI GOVERNMENT and the Claimant desire to fully and finally resolve by this Discharge all claims for outstanding balance and other matters arising out of or in connection with the CLAIM mentioned in A above.*

THEREFORE, the parties agree, in consideration of the Discharge and other undertakings and agreements herein contained, and for other good and valuable consideration, the receipt of which by each party from the other is hereby acknowledged, as follows:

1. Concurrently with the execution of this *Discharge*, the **MALAWI GOVERNMENT** shall deliver to the Claimant, **MALAWI GOVERNMENT** Cheque in the total amount of MK7,478,000.00 Cheque number 000168 issued on 19th April, 2021.
2. The Claimant, for and on behalf of itself and its predecessors, successors, assigns, principals, agents and representatives, does hereby wholly indemnify, relieve, release and forever discharge the **MALAWI GOVERNMENT** its concerned **Ministries, Departments and Agents** and its predecessors, successors, assigns, principals, agents and representatives under the General Agreement (**Released Parties**) from any and all claims, rights, debts, liabilities, demands, obligations, conditions, promises, acts, agreements, costs, interest, expenses, accountings, damages, and actions, of whatever kind or nature, whether in law or in equity, whether known or unknown, which they have had, may now have or may hereafter have against the **Released Parties** for or by reason of any occurrence, matter or thing through and including the date hereof which arises out of or in connection with the General Agreement including any loss of money that may arise where the Claimant in its sole discretion decides to negotiate the said Cheque before its maturity date.
3. Without prejudice to the generality of the foregoing, it is expressly agreed and accepted by each of the parties to this *Discharge* that this *Discharge* serves as a general release of all claims by the Claimant against the **MALAWI GOVERNMENT** in respect of the CLAIM including those claims which the Claimant did not know or suspect to exist in its favor at the time of executing this *Discharge*, even if such claims, if they had been known to it, could have affected the terms of the settlement reached between the parties as contained in this *Discharge*. To the extent that legislation or any principles of law might provide otherwise than the first sentence of this clause, such legislation and principles are hereby expressly waived and excluded by each of the parties to this *Discharge*, who admit full knowledge and understanding of the consequences and effect of such waiver and exclusion.
4. This *Discharge* contains the entire agreement of the parties to settle the disputes and liabilities referred to herein, and expresses the entire agreement between the parties in relation to the CLAIM. Neither party has entered into this *Discharge* in reliance upon any representation, warranty or undertaking of any other party which is not set out or referred to in this *Discharge*.
5. This *Discharge* shall be effective when each party has executed it.
6. Each party acknowledges and confirms that the preparation of this *Discharge* has been a joint effort of all parties and counsel for all parties and that it shall be construed fairly in accordance with its terms and shall not be construed for or against any individual party.
7. This *Discharge* shall inure to the benefit of, and shall be binding upon, the successors and assigns of the parties hereto, and each of them.

8. *This Discharge shall be construed and enforced in accordance with the laws of Malawi.*
9. *The MALAWI GOVERNMENT, on the one hand, and the Claimant, on the other hand, each represents that it has full power to enter into this Discharge, and that it has not previously assigned, encumbered or in any manner transferred all or any portion of the claims, rights or property interests covered, mentioned or released by this Discharge.*
10. *To the extent that the Claimant has executed this Discharge on its own it warrants hereby that it has taken full legal advice prior to executing the same."*

The application is opposed to by the Claimant and there is in that regard two statements, sworn respectively by Mr. Fredson Banda [Hereinafter referred to as the "Claimant's sworn statement"] and Mr. Innocent Zimba [Hereinafter referred to as the "Claimant's supplementary sworn statement"].

The substantive part of the Claimant's sworn statement is couched in the following terms:

- "3. *THAT I have read the Defendants' application for an application to dismiss matter for want of merit and I respond as follows;*
4. *THAT I refer to paragraph 1 and 2 of the Defendants' sworn statement and make no comment thereof;*
5. *THAT I refer to paragraph 3 of the Defendants' sworn statement and states that the Claimant commenced the present proceedings by way of summons on 9th January, 2015 claiming inter-alia damages for breach of promise/undertaking to be assessed, MK7,478,000.00 being special damages and cost of the action to be taxed.*
6. *THAT I refer to paragraph 4 of the Defendant's sworn statement and make no comment thereof.*
7. *THAT I refer to paragraph 5 of the Defendant's sworn statement and deny its contents and further state that the Defendant held private discussions with the Claimant without the knowledge of the Claimant's legal practitioners.*
8. *THAT I refer to paragraph 6 of the Defendant's sworn statement and make no comment thereof.*
9. *THAT I refer to paragraph 7 of the Defendant's sworn statement and state that the Defendant's privately summoned the Claimant to their offices and made her to sign the Release and Discharge agreement whilst well aware of the Claimant's illiteracy and her failure to comprehend the contents of the said documents she was signing.*

10. *THAT I refer to paragraph 9 above and state that before signing the said documents, the Claimant inquired from the Defendant if this was the only sum of money she was to get and the Defendant expressly informed the Claimant that the sum of MK7,478,000.00 was for travel and other expenses, and also loss of her business and that the rest would be assessed and awarded to her at a later date.*
11. *THAT I further state that the Defendant's conduct of taking advantage of her illiteracy by only inviting the Claimant and making private agreements to pay her compensation without knowledge of the Claimant's Legal Practitioners is not only unconscionable but also unprincipled after it was well aware that the Claimant was legally represented by Legal Aid Bureau at the time.*
12. *THAT I refer to paragraph 8 of the Defendant's sworn statement and deny its contents and further state the executed Release and Discharge agreement was unconscionable and unprincipled as the matter was before this Honourable Court and the agreement should have been executed through a consent/agreed order or through a settlement agreement in which this Honourable Court was to formal issue and therefore the Defendant is still liable to pay for the remaining claims and costs.*
13. *I therefore submit that the Application to Dismiss the matter for want of merit herein be dismissed with costs awarded to the Claimant as the Defendant has suppressed material facts."*

The Claimant's supplementary sworn statement will also be quoted in full:

- "3. THAT I have read the Sworn Statement in support of application and the Sworn Statement in opposition and I would like to respectively reply and add in the manner appearing herein below.
4. THAT by an order of the Court dated 10th June 2019, the Defendant's Defence was struck out; and the Court made further orders mandating the Defendant to pay the Claimant damages for breach of promise/undertaking to be assessed, the sum of MK7,478,000.00 as special damages and costs of action to be assessed. Produced and marked as "IZ 1" is a copy of the said Order.
5. THAT the Defendant only paid the Claimant the sum of MK7,478,000.00 representing the special damages leaving out the damages for breach of promise/undertaking and the costs of action.
6. THAT I refer to paragraph 7 of the Sworn Statement in Support of the Application and state that the Claimant did not sign the alleged Release and Discharge Agreement as she does not know how to write, instead she uses her thumbprint. Produced and marked as "IZ 2" is a copy of a letter to the Defendant from the Claimant showing how she authenticates her documents.

7. *THAT the Defendant was well aware that the sum of MK7,478,000.00 represented special damages only. Produced and marked as "IZ 3" is a copy of a memo from the office of the then Attorney General to the Secretary to the Treasury.*
8. *THAT the Defendant is also well aware that a Court Judgment striking out defence cannot be overlooked and trumped upon in the manner that the Defendant attempted to do.*
9. *THAT in the circumstances, the Defendant's application is simply a waste of Court's time, vexatious and an abuse of Court process, and should be dismissed with costs."*

The issue for determination in this application is whether or not the Claimant can still maintain an action for interest against the Defendant after she signed a Release and Discharge Agreement wholly discharging the Defendant from any and all claims in respect of this case?

It is the case of the Claimant that the Release and Discharge Agreement lacks validity because it was obtained by taking advantage of the Claimant's illiteracy, need through suppression of very pertinent information. The submissions on this point are covered in the Claimant's skeleton arguments as follows:

"In the present matter, the Claimant (sic) failed to disclose that they privately summoned the Claimant to their offices and made her sign the Release and Discharge agreement whilst well aware of the Claimant's illiteracy and her failure to comprehend the contents of the said documents she was signing.

That before signing the said documents, the Claimant inquired from the Defendant if this was the only sum of money she was to get and the Defendant expressly informed the Claimant that the sum of MK7,478,000 was for travel and other expenses, and also loss of her business and that the rest would be assessed and awarded to her at later date.

That the Defendant's conduct of taking advantage of her illiteracy by only inviting the Claimant and making private agreements to pay her compensation without knowledge of the Claimant's Legal Practitioners is not only unconscionable but also unprincipled after it was aware that the Claimant was legally represented by Legal Aid Bureau at that time.

Therefore, it is our prayer that the application to dismiss the matter for want of Merit can be dismissed with costs on the basis of suppression of material facts."

I confess I cannot concur in this reasoning. I do not think that it is well founded in law. I have always understood the position of the law to be that a properly executed Release and Discharge Agreement has the force of a binding contract and there must be strong evidence of fraud, misrepresentation or mutual misunderstanding for the Court to set aside such a Release and Discharge Agreement. In this respect, a Release

and Discharge Agreement is more or less in the same category as a judgment or order by consent. It acts as an estoppel and it is binding on the parties until set aside by a fresh action for that purpose: see **Bhima v. Bhima** 6 MLR 427, **Shiptrade International Company Limited v. Transglobe Produce Exports I** MLR 87 and **Lewis v. Lewis** [1977] 1 WLR 409.

As correctly asserted by the Defendant, the Release and Discharge Agreement fully exonerates the Defendant from any claims against the Government in respect of all claims, including those that the Claimant did not know: see paragraphs 2, 3 and 4 of the Release and Discharge Agreement.

In view of the foregoing and by reason thereof, the order of assessment of damages is set aside and the Claimant is estopped from making any claims against the Government in respect of this case. It is so ordered.

Pronounced in Chambers this 25th day of October 2022 at Lilongwe in the Republic of Malawi.

A handwritten signature in black ink, appearing to be 'KMB' followed by a flourish, enclosed within a hand-drawn oval.

Kenyatta Nyirenda
JUDGE