IN THE SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 81 OF 2019

(Being High Court, Commercial Division, Commercial Case No. of , Blantyre)

BETWEEN:

LAFARGE CEMENT MALAWI LIMITED----------APPELLANT

AND

ASLAM ABDUL GAFAR t/a ZAGAF----------1ST RESPONDENT

CEMENT PRODUCTS LIMITED----------2ND RESPONDENT

CORAM: HON. JUSTICE L.P. CHIKOPA SC, JA

HON. JUSTICE F.E. KAPANDA SC, JA

HON. JUSTICE H.S.B. POTANI JA

HON. JUSTICE I.C. KAMANGA JA

HON. JUSTICE M.C.C. MKANDAWIRE JA

HON. JUSTICE S.A. KALEMBERA JA

HON. JUSTICE D. MADISE JA

HON. JUSTICE R. MBVUNDULA JA

HON. JUSTICE D. nyaKAUNDA KAMANGA JA

Mr Masumbu, Counsel for the Appellant

Chalamanda/Mapemba/Majawa, Counsel for the Respondents

W.P. Shaibu, Judicial Research Officer

Minikwa/Mrs Fundani, Recording Officers

Mutinti, Court Reporter

JUDGMENT

M.C.C. Mkandawire JA

1. The appellants commenced this matter in the Court below in 2013 claiming US$1,544,981.32 as restitution for a benefit enjoyed by the respondents in the form of alleged expenditure by the appellants on mining projects which it operated as a joint venture with the respondents.

2. The background to this matter is that the appellant is a predecessor in title to what used to be known as Portland Cement Company Limited. The appellant caries on the business of cement manufacturing in Malawi. The 1st respondent was a distributor of the cement manufactured by the appellant carrying out its business under the name 'Zagaf Cement Sale Company'. The 2nd respondent is a duly registered company in Malawi carrying out the business of cement manufacturing.

3. The appellant and the 1st respondent agreed to establish a joint venture called Lafarge Chemkumbi Cement Limited. The agreement was to exploit limestone deposits in the parties' concession areas in Balaka and Mangochi. A subscription and shareholding agreement was accordingly entered into by the parties on 26 July 2007. The agreement however did not become effective. That, notwithstanding, the appellant with the approval and encouragement of the 1st respondent advanced up to US$1,544,891.22 towards drilling and prospecting activities in the Chemkumbi Hills and Chiripa Hills areas. Before the appellant would have the benefit of this heavy investment, the 1st respondent unilaterally withdrew from the Joint Venture Agreement with the appellant. The appellant asserted that the business of the 2nd respondent unjustly benefited from the appellant's investment in the circumstances hence the claim in the Court below.

4. The matter between the parties was resolved through a "Consent Order" without admission of liability by either party dated 7th June 2013. In that Consent Order, there is a term which provided that the 1st and 2nd respondents shall pay the appellant the total cost being direct and indirect costs of Chiripa (Nkopola) in relation to 49 holes and the general costs relating to Balaka shall be shared in the proportion of 15% and 85% between the respondents and the appellant.

5. The parties failed to agree on sums payable on some items causing the matter to go for assessment before the Assistant Registrar. The Assistant Registrar found as follows:

i. appellant had failed to prove special damages.

ii. the Assistant Registrar could award general damages where special damages were not proved.

iii. the appellant was entitled to Mk200,000,000.00 as general damages.

6. Dissatisfied with the ruling of the Assistant Registrar, the appellant filed a notice of appeal against the whole judgment of the court below as follows:

1.The Learned Registrar in the lower court erred in law by holding that the entire evidence tendered by Mwai Kadangwe was hearsay evidence.

2. The learned Assistant Registrar in the lower court erred in law by refusing to make an award of interest on top of the award of damages since the claim for interest was properly pleaded.

7.The respondent also being dissatisfied with the order of assessment, filed a notice of cross-appeal as follows:

i. The Registrar erred in law and fact in awarding the plaintiff damages in the sum of MK200,000,000.00 when she had properly found that the plaintiff failed to prove special damages;

ii. The Registrar erred in law and fact in awarding the sum of MK200,000,000.00 without any evidence of such loss by the respondent.

iii. The Registrar erred in law by asserting that MK200,000,000.00 was a reasonable sum of compensation in the circumstances.

iv. The award of Mk200,000,000.00 was against the weight of the evidence.

8. On 22nd May 2020 the respondent filed an ex-parte notice of application to adduce new evidence on appeal pursuant to Order 111 rule 24 of the Supreme Court of Appeal Rules. The application was supported by a sworn statement of Mwaiwathu Majawa. The new evidence to be introduced is the Mining Licence Number ML 0100/12 dated 15th June 2012 to Lafarge Malawi Limited the appellant in this appeal. The respondents said that they were not aware of the existence of the documents during the proceedings in the Court below. The appellant did not disclose the existence of this document during discovery.

9. After deliberations on the issue of introduction of new evidence, the Court took a unanimous position that the application to adduce new evidence would not be allowed. That there was no way the respondents would be allowed to introduce new evidence at this stage. In any event, the parties had a consent judgment.

10. Our understanding of the matter therefore is that this appeal would be narrowed down to whether the evidence that was adduced was hearsay evidence and issue of interest and damages.

11. The appellant submitted that during assessment of damages by the Assistant Registrar, the appellant paraded two witnesses. The first witness was Mr Mwai Kadangwe (PW No 1) and the second witness was Mr Nestor Msowoya (PW No 2). The respondents did not call any witnesses or evidence.

12. The evidence of PW No. 1 the Assistant Accountant focused on exhibits MKC1-17, MKB1-41, and MKS1-5. The total cost in relation to Chiripa according to MK1-47 is MK29,026,071.08, F3,586.00, US$417,114.11, ZAR158,550.00 and 39,835.84 Euros.

13. As regards 15% costs related to Balaka the percentage was with reference to costs in exhibits MKB1-MKB41, gave the following amounts; MK1,958,851.98, US$220,556.72, ZAR336,685.15 and 7060.97 Euros.

14. The appellant also submitted that the witness had also testified about expenses incurred by the appellant whose supporting documents have not been located at Chiripa and Balaka at MK3,370,702.90, Mk286,775.13, 494.70 Euros and ZAR6,689.33. All the claimed sums were weighted against the US$ and the total was US$972,232.84. The appellant it is submitted also prayed for compound interest at the commercial lending rate on the sums to the date of actual payment.

15. Nestor Msowoya the appellant's Business Development Manager testified that the first respondent had attended most of the meetings of the joint venture and was fully aware of the venture's developments. The witness also attended these meetings and he tendered exhibits NM1 to NM6.

16. It is the appellant's submission that the Assistant Registrar rejected all the documents tendered by PW No. 1. Counsel referred at length to the Registrar's reasoning found at page 3 of the Registrar's Ruling. In a nutshell, Counsel said that the Registrar found that PW No. 1 could not testify to the documents he neither authored nor which were not addressed to him. It was further submitted that the Assistant Registrar found that the plaintiff had failed to prove special damages for Chiripa in relation to the 49 holes and also 15% of costs for Balaka. The Assistant Registrar went on to award MK200 million.

17. It is the appellant's submission that the Assistant Registrar made a "daming" decision on the evidence tendered; by saying that the evidence was hearsay as it was

neither original or authored by Mwai Kadangwe. Counsel referred to the case of **Malawi Savings Bank Limited v Malidade Mkandawire t/a Malangowe Investments** MSCA Civil Appeal No. 38 of 2014. At page 4 of the Judgment the Court made the following remarks pertaining to the rule against hearsay;

> *"On the rule against hearsay, the court below had relied on the cases of Subramanian v Public Prosecutor (1956) I WLR 965, S. Boardman v Prime Insurance Limited Civil Cause No. 1238 of 2000 (unreported); Denmark Watson v Nico General Insurance Company Ltd Civil Cause No. 1570 of 2010 (unreported), Mputahelo v Republic [1999] MLR 222. Counsel for the appellant argued that to the rule in Subramanian v Republic (supra), there are exceptions founded on good public policy as in Mputahelo (supra). He argued the cheque images and the letters from the respective banks where the cheques were deposited did not amount to hearsay evidence. In any event, they would constitute an exception to the rule against hearsay."*

The Court further said:

> *"In deciding whether the rule against hearsay has been breached or not, it is essential to examine the purpose for which the evidence is tendered. It is important to recognize that as a law of evidence develops, and with technological advancements in society, these emerge an increased number of exceptions to the rule against hearsay----------''*

18. The appellant argued that the respondent did not dispute or challenge the admissibility of the evidence given by Mr Mwai Kadangwe. The witness Kadangwe was exposed to a vicious cross examination pertaining to the various documents which he tendered in evidence without any objections coming from the respondents. This conduct by the respondents therefore amounted to a waiver of any alleged " non-admissibility of the evidence."

19. The appellant went on to argue that the approach taken by the Assistant Registrar on hearsay evidence was a wrong one. The Assistant Registrar should have noted that recent developments in both statutory and common law, have showed much relaxed approach to the rule against hearsay. Under the current regime a court should always consider whether the evidence is sufficiently relevant for the determination of the issues or issues in the case.

20. Applying the above principles, the evidence of Mwai Kadangwe Counsel submitted ought to have been considered having already been admitted. The evidence of Mr Nester Msowoya was admitted without any issue and should have been given the weight it deserved.

21. On the issue of interest, the appellant specifically pleaded interest. The amount of claim was essentially a 'debt.' As per section 11 of the Court's Act, interest is awardable. Counsel referred to the case of **Dan Kamwanza and Mavuto Kasote t/a Kamwaza Design Partnership v ECOBank (MW) Limited MSCA Civil Appeal No. 45 of 2014.** It is submitted that the Assistant Registrar should have awarded interest based on compound interest.

22. The respondents also made submissions. It was submitted that the Assistant Registrar held that Mr Mwai Kadangwe's evidence was hearsay evidence on the basis that he was not the author of any of the documents tendered by him as part of his testimony. The respondent relied on the case of **Subramanian v Republic Prosecutor (Supra)** and **Mputahelo v Republic (Supra).**That the evidence of Mwai Kadangwe could not be used to prove expenditure that the appellant claimed to have made for the joint venture. The documents were not authored by the witness. It was therefore submitted that the Assistant Registrar was correct in rejecting the evidence of Mwai Kadangwe. Even if the evidence of Mwai Kadangwe was admissible under some exception to the rule against hearsay, it is still not proof of loss and expenditure by the appellants. The witness actually admitted that none of the documents tendered were proof of actual expenditure. On the issue of interest, the Court did not err in law in making no award of interest on damages because this is not a matter in which the Court had the jurisdiction to award interest on damages. Interest on damages is first available under section 11(v) of the Court's Act. Thus interest can only be awarded in claims of debts, judgment debts, summons found to be due after taking an account as between the parties or sums found due and unpaid by receivers and other persons liable to account to the High Court. In the case before the Court, it was submitted that the claim by the appellant is not a debt. Therefore, interest on damages it was submitted cannot be awarded in these circumstances. Interest is also available in judgments debts under section 65 of the Courts Act. A judgment debt is a debt arising from a judgment. The appellant is not claiming that either, therefore they are not entitled to interest on damages. Lastly, the assessment was pursuant to a Consent Order of 7th June 2013. This Order does not provide for an award of interest on damages. It was submitted that a Consent Order is binding

on the parties see the case of **Shiprate International Company Limited v Transgrobe Produce Export Limited [1997] MLR 87 at 88.**

23. On the issue of MK200 million as damages for the appellant, this was made notwithstanding the Court's finding that the evidence of Mwai Kadangwe was hearsay and not admissible. The Court also accepted the evidence of Mr Nester Msowoya and the Court below was under the impression that the appellant had incurred costs of Mk466,000,000.00. The Court below also awarded the sum of Mk200 million as damages relying on the principle established by this Court in the case of **Nazir Osman t/a Cotton Centre v security Malawi and Another (Unreported) MSCA 19 of 2010.** The respondent however submitted that the present case can be distinguished from the **Nazir Omar Case (Supra).** In the Nazir Omar Case, the respondent argue that the Court found that both general and special damages had been pleaded. The Court then proceeded to find that it could make an award under the head of general damages where a party had failed to prove special damage. The present case it is submitted is distinguishable from the Nazir Omar case because the assessment of damages follows the Consent Order that the parties had set. The amounts as stated in the Consent Order are liquidated and they were in specific terms. The Consent Order specifically referred to cost and apportions these costs in percentages as between the parties. The award directed by the Consent Order was one for special damages and had to be proved strictly. **24.** Evidence had to be led. It was therefore submitted that the evidence of Mwai Kadangwe was dismissed as hearsay. The evidence of Nester Msowoya did not prove any payment.

25. In conclusion, the respondents submitted that the award of general damages must have a basis. In this case all the evidence was hearsay on the part of Mwai Kadangwe or proof of planned rather than actual expenditure on the part of Nester Msowoya.

26. We have received submissions from both sides. There is abundant case law that has been presented to us. It is trite law that evidence of the truth of a statement made by a person not called as a witness cannot be brought as evidence of the truth of that statement. The cases of **Subramanian v Public Prosecutor (supra)** and **Mputahelo-vs-Republic MLR 222 at 227** are good authorities on this. After analyzing all the documentary evidence that Mr Kadangwe had tendered in the court below, we are satisfied that none of these documents were issued by him. This evidence could therefore not be used to prove the expenditure the appellant claimed to have made for the joint venture. The Learned Registrar in the court below was

therefore correct in rejecting the evidence of Mwai Kadangwe, as such evidence was not proof of damage.

27. We further found that even if the evidence of Mwai Kadangwe was admissible under some exception to the rule against hearsay, that evidence did not in any way show loss or expenditure incurred by the appellant to substantiate their claim for damages. The evidence in other words was not on point. This rendered the evidence irrelevant and inadmissible as its value is not worth the salt.

28. On the issue of failure to award interest on top of the award of damages, we have carefully looked at the law. Interest on damages is available first under section 11(v) of the Courts Act. Under this law, interest can only be awarded in claims for debts, sums found to be due after taking an account as between the parties or sums found due and unpaid by receivers and other persons liable to account to the High Court. The courts have repeatedly reiterated the very restricted circumstances in which interest on damages are available. See the cases of **Suleman v National Insurance Company Limited [1996] MLR 72 MSCA, Gwembere v Malawi Railways Limited 9 MLR 369, Talbord v David Whitehead and Sons (Malawi) Ltd [1995] 1 MLR 297 and Mungonya and Another v ESCOM [1997] 1 MLR 295.** In all these cases, the court clearly stated that interest on damages is only available on debts. We noted that the claim by the appellant in the court below was not a debt.

28. Interest is also available on judgment debts under section 65 of the Courts Act. The clear meaning of judgment debt means the amount that the court has awarded as damages that remains unpaid. In other words, it means a debt arising from a judgment of a court. The appellant was not claiming such a debt either. We noted that the assessment in the court below was made pursuant to a Consent Order dated 7th June, 2013. A consent Order binds the parties to a case. In this case the appellants and the respondents were bound to it. The Consent Order dictates the future conduct of proceedings. This Order unfortunately does not provide for an award of interest on the damages. As such the Learned Registrar in the court below could not consider the question of interest on damages.

29. In conclusion, we have gone through all the documents that were filed with the court. We have listened to the submissions that were made by both sides. It is our unanimous decision that this appeal should be dismissed. We order that costs of the appeal should go to the respondents.

30. We now move to the cross-appeal. The court below in its ruling on assessment of damages made an award of MK200,000,000.00 as damages to the appellant. This award was made despite the fact that the same court had found the evidence of Mwai Kadangwe to be hearsay and inadmissible. The court below had rejected all the documents tendered by Mwai Kadangwe.

31. In awarding the appellant MK200,000,000.00, the court below heavily relied on the case of **Nazir Omar t/a Cotton centre v Securicor Malawi and Another (Unreported) MSCA 19 0f 2010.** It is however very clear that the present case is distinguishable from the **Nazir Omar** (supra) case. In the **Nazir Omar** case, focus was on the pleadings. In the **Nazir Omar** case, both general and specific damages had been pleaded. The court in that case proceeded to find that it could make an award under the head of general damages where a party had failed to prove special damages. What is very clear here is that special damages need to be proved and cannot be awarded otherwise.

32. The present case is therefore very different from the **Omar Nazir** case (supra) because the assessment of damages in the court below emanated from a Consent Order. Furthermore, the amounts in the Consent Order are liquidated. They are in specific terms. The Consent Order specifically referred to costs incurred by the parties and that these costs are apportioned in percentages between the parties. These were therefore special damages As such, such damages had to be proved strictly as the claim is related to specific costs identified in the Consent Order. Evidence had to be led. As already pointed out, the evidence of Mwai Kadangwe was dismissed as hearsay and the court has just confirmed the finding by the court below. The evidence of Nestor Msowoya does not prove any costs that were incurred by the appellant.

33. We find that the award of MK200,000,000.00 as general damages has no basis at all. The evidence that was tendered by the appellant cannot be the basis for an award of general damages especially an award to the magnitude of Mk200,000,000.00 without spelling out the basis for its award. In this case, all the evidence is hearsay on the part of Mwai Kadangwe and proof of planned rather than actual expenditure on the part of Nester Msowoya.

34. We therefore find that the court below erred in law by awarding the appellant MK200,000,000.00. This award was against the weight of the evidence available. The cross-appeal therefore succeeds. We order that costs of the cross appeal should go to the respondents.

DELIVERED in open Court this 12th day of July 2022 at Blantyre.

HONOURABLE JUSTICE L.P. CHIKOPA SC JA

HONOURABLE JUSTICE F.E. KAPANDA SC JA

HONOURABLE JUSTICE H.S.B. POTANI JA

HONOURABLE JUSTICE I.C. KAMANGA JA

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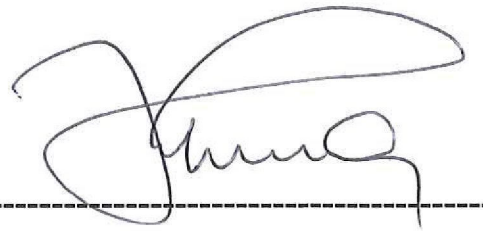
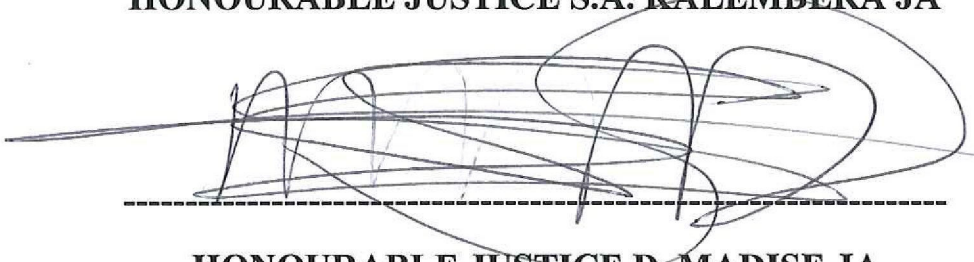
HONOURABLE JUSTICE D. nyaKAUNDA KAMANGA JA



HONOURABLE JUSTICE S.A. KALEMBERA JA



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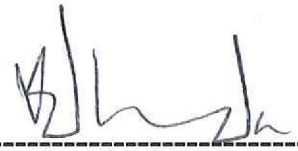
HONOURABLE JUSTICE R. MBVUNDULA JA



HONOURABLE JUSTICE D. nyaKAUNDA KAMANGA JA