C.J.

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.16 OF 1988

BETWEEN:

PEARL ASSURANCE PUBLIC LTD. CO. .... APPELLANT

\- and -

THE ATTORNEY GENERAL .... RESPONDENT

Before: The Honourable Mr. Justice Banda, J.A.
The Honourable Mr. Justice Unyolo, J.A.
The Honourable Mr. Justice Mtegha, J.A.

Mbendera, Counsel for the appellant
Kamanga, Senior State Advocate, for the Attorney General
Kadyakale, Law Clerk
Phiri, Court Reporter

JUDGMENT

Unyolo, J.

This is an appeal from a judgment of Jere, J. delivered on 22nd February, 1988 in which the learned Judge found for the respondent in the sum of K41,213.00.

The history of the case is as follows: The Malawi Government entered into an agreement with a building contractor called Milimo Building Contractor for the construction, completion and maintenance of a District Hospital at Karonga Boma at a consideration of just a little over K2.6 m. Due to financial difficulties the building contractor was compelled to ask for an advance payment from the employer, the Malawi Government, to bolster his cash flow. The Government was prepared to grant the advance if a surety was found and a bond executed. That was how the appellant came on the scene as such surety and a bond was executed by the appellant and the building contractor on the one hand and the Government on the other. Under the terms of the bond the sum of K70,000 was advanced to the building contractor and the appellant undertook thereon to satisfy and discharge the said amount if by any reason the contract to build the Hospital fell through and the building contractor was unable to repay the money.

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As things turned out the building contractor slid into further financial problems and the Government, eager to keep the said building contractor on site and apparently relying on a provision in the bond, arranged to pay back to the building contractor the sum of K35,000 from the amount which had been recovered from him under the terms of the bond. This was done without the knowledge of the appellant. Before long the building contractor failed to carry on with the work and the Government terminated the contract. The appellant was then called upon to pay the amount owing by the building contractor under the bond at the material time namely the K41,213 mentioned above, claiming that the building contractor had by then only repaid the sum of K28,787. The appellant refused to pay the said sum contending that the building contractor had in actual fact paid the sum of K63,787 out of the K70,000 advanced and not K28,787 as contended by the Government/respondent. It was contended further that the appellant was not liable to pay the K35,000 refunded to the building contractor as the transaction was effected without its knowledge or consent and that the same was not covered by the bond. The respondent then instituted the proceedings in this case claiming the said sum of K41,213. After reviewing the proferred evidence the learned Judge made several findings of fact and concluded that the arrangement under which the K35,000 was paid to the building contractor fell within the ambit of the bond. He therefore entered judgment for the respondent for the sum claimed. It is against that decision the appellant now appeals to this Court.

Seven grounds of appeal were submitted. These are:-

i) The Learned Judge erred in both law and fact in finding that the bond constituted a contract of insurance.

ii) The Learned Judge erred in law in failing to make a finding as to whether on true construction of the bond the appellant guaranteed a single transaction or whether it guaranteed a series of transactions.

iii) The Learned Judge erred in law in failing to make a finding of fact as to whether the sum of K35,000 paid by the respondent to the contractor on or about the 17th day of January 1986 formed part of the sum of K70,000 advanced by the respondent or whether it constituted a separate advance or transaction altogether.

iv) Alternatively, the Learned Judge having found that the sum of K35,000 constituted a unilateral injection by the respondent, the Learned Judge erred in both law and fact in finding that the sum of K35,000 was covered by the bond.

v) The Learned Judge erred in failing to make a finding as to the meaning of the word "forbearance" as used in the bond.

vi) The Learned Judge erred in finding that "the unilateral injection of K35,000" as described by the Learned Judge, constitutes forbearance by the respondent within the ambit of the bond.

vii) The Learned Judge erred in finding that "the unilateral injection of K35,000" as described by the Learned Judge constitutes forgiveness within the ambit of the bond.

We now turn to the first ground of appeal. After examining the evidence the learned Judge observed that the bond in this case constituted a contract of insurance and that the Government was consequently under a duty to disclose to the appellant the transaction relating to the K35,000, already mentioned. Mr. Mbendera, counsel for the appellant, submitted before us that this finding is erroneous and that the bond constituted a mere contract of guarantee. Mr. Kamanga, Senior State Advocate, expressed emphatic agreement in this submission but pointed out that the learned Judge's decision at the end of the day was however not grounded upon the footing that this was a contract of insurance. He submitted that consequently no failure of justice was occasioned in so far as the finding on this aspect is concerned.

The issue here can be disposed of quickly. Although the appellant is an insurance company it is clear from the words used in the bond, Exhibit 2A, that the agreement envisaged there was a contract of guarantee as opposed to a contract of insurance. We are indeed confirmed in this by the decision in Trade Indemnity Company v. Workington Harbour and Dock Board (1937) A.C. 1, a case cited before by Mr. Mbendera. All in all, we agree with counsel that the finding of the Learned Judge on this aspect cannot be supported.

We now turn to the second ground of appeal wherein it is contended that the court below erred in failing to make a finding as to whether on the true construction of the bond, the appellant guaranteed a single transaction or a series of transactions. Again, this issue can be disposed of without much ado. Indeed there is no dispute upon this point. We have examined the evidence closely, the bond in particular, and are satisfied that the bond guaranteed a single transaction, namely a payment in the sum of K70,000 by the appellant to the Malawi Government if, as did subsequently happen in this case, the building contractor failed to repay the money advanced to him under the bond. We so find.

Next we turn to the third and fourth grounds of appeal. We will deal with these two grounds together. The question posed here is whether the sum of K35,000 paid by the Government to the building contractor formed part of the sum of K70,000 advanced earlier under the bond or whether it constituted a separate advance. This is one of the most crucial questions raised in this appeal. As already indicated it is not disputed the appellant guaranteed a repayment of the K70,000 advanced to the building contractor under the terms of the bond. We have found that the bond in question constituted a single transaction vis-a-vis the K70,000. And it is not disputed that after the said sum was advanced the Government allowed the building contractor access to a further sum of K35,000. The appellant contends that this latter transaction constituted a separate advance. It was submitted that the two must necessarily be separate advances different from each other both in quantum and the time they were given to the building contractor.

In order to appreciate what happened in relation to the said sum of K35,000 it is necessary to examine closely the evidence of the two witnesses called on the part of the respondent. The total evidence of the two witnesses can be summarised thus: The building contractor drifted deeper and deeper into financial difficulties. He needed more money to be able to buy materials and carry on with the work at the Hospital. No suppliers were willing to allow him get things on account. In order therefore to keep the building contractor on site the Government decided to pay back to the said building contractor part of the money that had been recovered from him, a total sum of K35,000 so he could complete the job. To put it in PW2's own words (at page 49 of the case record):

> "That was an adjustment of the amount which we had recovered to allow the contractor a refund .... we reduced the amount of recovery as a means of giving the contractor a refund on monies already recovered in order to ensure that the contractor remained working."

PW2 went on to say that it was the understanding of both parties that only one advance had been granted to the building contractor. The witnesses stressed that this was not a case where the building contractor applied for and was given a second or separate advance. Rather this was money provided to the building contractor out of the very repayments he had made and this was done in order to bolster up his cash flow so he could finish building the Hospital. What happened, in other words, was that the monies recovered from the building contractor were adjusted and part thereof refunded to him in order to help him out. Such was the net evidence.

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Pausing there it is to be observed that prima impressionis one would be inclined to think that a separate advance was made to the building contractor on the facts proferred in this case. It is to be noted however that the respondent's witnesses emerged firm in their explanation of what happened in this matter and considering their evidence closely it will be seen that the K35,000 here did not come outside of the K70,000 earlier advanced to the building contractor. Surely, if a separate advance were contemplated one would expect the Government to have drawn up and executed a formal agreement or bond vis-a-vis the K35,000. All in all, we find that the said sum of K35,000 did not constitute a separate advance.

We finally turn to the fifth, sixth and seventh grounds of appeal which we will also deal with together. The short question here is whether the refund or, as was also called, "claw back" of the K35,000 was an act which was authorised or permissible under the terms of the bond. In this context the relevant paragraph of the Bond reads:

> "Now the condition of the above-written Bond is such that if the Contractor shall duly perform and observe all the terms, provisions, conditions and stipulations of the said contract in respect of repayment of the said advance or if no default by the Contractor the Surety shall satisfy and discharge the sum owed by the Contractor to the Employer up to the amount of the above-written Bond or such lesser amount as may be owed at the time of default then this obligation shall be null void but otherwise shall be and remain in full force and effect but no alteration in terms of the said Contract made by agreement between the Employer and the Contractor or in the extent or nature of the works to be constructed, completed and maintained thereunder <u>and no allowance of time nor any forbearance or forgiveness in or in respect of any matter or thing concerning the said Contract on the part of the Employer shall in any way release the Surety from any liability under the above-written Bond</u>."

By a process of elimination the crucial words here are those we have underlined in the foregoing passage. And the question becomes: did the Government's act of giving back part of the moneis it had recovered from the building contractor, as indicated above, amount to a "forbearance or forgiveness" within the meaning of the bond herein? On this aspect the learned Judge said:

> "It is clear therefore that these words are very wide. Indeed forbearance, for instance, means forbearing the money that had already been received. Equally, to the money that they had already received and injecting back back into the business can be interpreted to mean that they had forgiven him to pay at that other time when he was about to pay and when he had actually paid."

Counsel for the appellant argued that the learned Judge failed to interpret the two words correctly. He submitted that forbearance means abstinence from enforcing what is due especially a debt and that in the context of this case there would have been an act of "forbearance" if the Government had suspended the repayments required of the building contractor or if it had given him more time to pay the advance but not, as it happened, the positive act of paying him back the K35,000. As regards the term "forgiveness", counsel said that this term means a giving up of any claim to something e.g. a debt and contended that there would have been an act of forgiveness in the present case if the Government had abandoned its entitlement to the K70,000 or whatever money that remained unpaid at the material time.

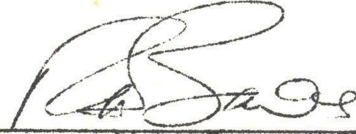
Pausing there we would admit that the situations exemplified by counsel herein would indeed amount to a forbearance or forgiveness as contended by counsel. The question posed is: are the said words restricted in their meaning as suggested by counsel? The learned Judge answered the question here in the negative. He took the view, as pointed out above, that these words were very wide and concluded by saying that in his opinion the two terms equally applied to the money the Government had already recovered from the building contractor as they also applied to the balance still to be recovered.

We have wrestled hard and long over this matter. With respect we are unable to join with counsel for the appellant in his restricted interpretation of the two words - forbearance and forgiveness. As already indicated what the Government in fact did in this case was to reschedule the recovery terms of the advance in order to try and get the building contractor carry on with the construction of the Hospital and in an attempt also to give him more time to repay the advance. It was an exercise of patience, a show of mercy or indulgence on the part of the Government and that in essence was an act of forbearance, notwithstanding the fact that in the process the building contractor got back part of the money that had already been recovered from him. It is also to be observed that the amount of money the Government is claiming from the appellant does not exceed the sum of K70,000 the appellant guaranteed

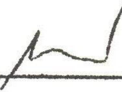
to pay under the terms of the bond. It is also to be noted that even if the Government had decided to abandon or relinquish its claim, i.e. forgive the building contractor outright vis-a-vis the said sum of K70,000 the appellant guaranteed under the bond, such an act or acts would be covered by the bond and the appellant would not be heard to complain.

All in all we have no reason to suppose that the learned Judge came to a wrong conclusion in this case. The appeal accordingly fails and is dismissed with costs.

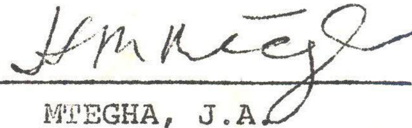
DELIVERED at Blantyre this 28th day of March, 1989.

(Signed) 

BANDA, J.A.

(Signed) 

UNYOLO, J.A.

(Signed) 

MTEGHA, J.A.