

IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NUMBER 17 OF 2018

(Being Commercial Case Number 86 of 2017, Blantyre Registry)

BETWEEN

STANDARD BANK LIMITED.....APPELLANT

AND

TOURISM INVESTMENTS LIMITED.....1ST RESPONDENT

EURO INDUSTRIES LIMITED.....2ND RESPONDENT

CORAM: HON. JUSTICE R.R. MZIKAMANDA SC, JA
HON. JUSTICE L.P. CHIKOPA SC, JA
HON. JUSTICE F. E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI JA
HON. JUSTICE J. KATSALA JA
HON. JUSTICE I.C. KAMANGA JA
HON. JUSTICE M.C.C. MKANDAWIRE JA

L. Ulaya, of counsel for the Appellant
N. Alide, of counsel for the Respondents
Mrs Chintande/ Minikwa, Court Clerks
Mrs Msimuko, Court Reporter

JUDGMENT

Mzikamanda S.C., JA,

My Lords and My Lady, I have read the opinion of Justice Katsala, JA and I agree with it entirely. For the reasons he gives, I would allow the appeal.

Chikopa S.C., JA,

My Lords and My Lady, I have had the advantage of reading in advance the opinion of Justice Katsala, JA. I agree with it, and for the reasons he gives I would allow the appeal.

Kapanda S.C., JA,

My Lords and My Lady, I too have read in advance the opinion of my learned friend Justice Katsala, JA. I agree with it, and for the reasons he gives I would allow the appeal.

Potani JA,

My Lords and My Lady, I have also read in draft the opinion of Justice Katsala, JA. I agree with it, and for the reasons he gives I would allow the appeal.

Katsala JA,

My Lords and My Lady,

In this appeal the appellant seeks the reversal of the decision made on 16 June 2016 by the Honourable Justice Dr Mtambo sitting in the Commercial Court at Blantyre entering summary judgment and judgment on admission in favour of the respondents for the sum of K145,074,000 for loss of profits, and compound interest thereon at the rate of 8% above the commercial bank lending rate, among other claims.

The appellant filed five grounds of appeal which state as follows: -

1. The learned Judge erred in law by entering summary judgment for the respondents when the defence put forward by the appellant and the affidavit in opposition to the application for summary judgment showed a good defence on the merits to the respondents' claims.
2. The learned Judge erred in law by entering a judgment on admission for the respondents when the appellant did not make any admission to the respondents' claims.
3. The learned Judge erred in law by entering summary judgment/judgment on admission for liquidated amounts in an action for breach of contract when the same were not assessed by the court or admitted by the appellant.

4. The learned Judge erred in law by entering summary judgment/judgment on admission for compound interest at 8% above the current commercial bank rate on the sums of K145,074,000 being loss of profits.
5. The learned Judge erred in law by entering summary judgment/judgment on admission for repair costs for damaged items.

The facts of the matter are very brief. The respondents commenced an action by writ of summons against the appellants for breach of agreement for the sale of real property known as Title Number Blantyre East 244 and claimed the sum of K145,074,000 as loss of profits, compound interest on this sum at the rate of 8% above the current commercial bank base lending rate calculated from date of breach to date of full payment, the sum of K3,677,959.88 being outstanding City Rates and utility bills, repair costs for damaged items and costs of the action. The appellant filed and served a defence denying liability and averred that if there was any delay in handing over the property to the respondents it was due to an order of injunction obtained by a third party, Chloride Batteries Malawi Limited restraining the appellant from conducting further dealings in the property. The appellant then took out third party proceedings against Chloride Batteries Malawi Limited seeking indemnity in the event that the appellant is found liable on the respondents' claims. However, the respondents made an application for summary judgment and judgment on admission on the ground that the appellant had no defence to the claims in view of its admission of the existence of the agreement and the taking out of the third-party proceedings was in effect an admission of liability to the claims. The court below granted the application and entered judgment for the sums of K145,074,000 and K3,677,959.88, compound interest as claimed and costs. It is against this judgment that the appellant has appealed to this Court seeking its reversal and an order that the action in the court below should proceed to trial.

Our view is that we need not spend much time on this appeal. It must succeed in its entirety. There are serious flaws in the judgment of the court below such that it has no basis to stand on.

Order 7, rule 1(1) of the High Court (Commercial Division) Rules, (hereinafter "the Rules") under which the application for summary judgment was made, provides as follows: -

"Where in an action to which this rule applies a writ has been served on a defendant and the defendant has filed and served his defence

and list of documents, a plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for final judgment against the defendant.”

Order 7, rule 3(1) of the Rules provides: -

“Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue, question or dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.”

Clearly, when faced with an application for summary judgment and or judgment on admission, there are a number of factors that the court needs to look at before it can enter judgment. We believe the court below did not consider such factors. First, it has to satisfy itself that indeed the defendant has no defence to the plaintiff’s claim or part thereof except as to amount of damages claimed (Order 7, rule 1(1) of the Rules). Secondly, the defendant has not raised an issue, a question or dispute which ought to be investigated through a trial. Thirdly, that there is no reason warranting a trial in respect of the claim or part thereof (Order 7, rule 3(1) of the Rules). Fourthly, the admission founding the application for judgment on admission must be unequivocal.

Order 7, rule 4(1) of the Rules gives the defendant against whom an application for judgment is made the liberty to show that he has a defence to the claim through an affidavit (in opposition to the application), his defence he has served and any other means to the satisfaction of the court. As such it is incumbent upon the court to consider all the pleadings filed by the parties, the affidavits for and against the application and the arguments presented and the law when coming up with a decision. And the judgment must show that the court has done this when coming up with its decision.

Sadly, in the present case, the Judge wrote a one sentence judgment, to wit, “Summary judgment or judgment on admission is entered as prayed.” We must say, this falls far short of what is required and expected of a judgment from a court of law, especially the High Court of Malawi. The most we can say is that such casualness and shoddiness should never find a place

in the courts. Needless to say, that judges (all judicial officers) need to be methodical in the way they do their business. As a basic rule, judgments and orders must contain reasons/grounds for the decisions they carry. That is the only way judges can ensure that they remain transparent in their decisions and/or work. A decision which has no grounds or reasons supporting it hangs in the air shrouded with mystery. It deprives the parties, the public and even the appellate court the opportunity to appreciate why and how the judge made that decision. It is a serious affront to judicial transparency and accountability. It denotes arbitrariness. And it is a recipe for the unwanted perception that bribery, corruption, underhand dealings and other extraneous considerations are the drivers of the wheels of justice which, inevitably, erodes public confidence in the justice system. We do not want that in our jurisdiction and we urge all judges to always bear this on their minds when discharging their duties.

We have considered the pleadings, the affidavits and the arguments filed and we are of the firm view that this was not a proper case for summary judgment or judgment on admission.

In its defence, the appellant denied delaying the transfer of the property to the respondent. Further, it averred that if there was any delay (which was denied), it was occasioned by and was a result of an order of injunction granted by the High Court in favour of a third party, Chloride Batteries Malawi Limited (the previous owners of the property), which restrained it (the appellant) from completing the sale to the respondent or conducting any further dealings in the property. The respondent was fully aware of the order of injunction and that the delay to deliver possession of the property, if any, was a result of the injunction.

In its affidavit opposing the application for summary judgment the appellant contended that the agreement to sell the property did not prescribe the time within which to yield possession of the property as such it could not be said outright that the appellant had delayed. This issue required investigation through hearing of evidence for it to be determined on the merits. The appellant also stated that the third party proceedings were not an admission - the appellant was only exercising an option of a remedy in the event that it was found liable to the respondents on their claims.

In our judgment, there is not much that we can say at this stage of the matter. Suffice to say that we find that the facts of the case raise the important question of whether a party can be held in breach of agreement

where the alleged breach is a result of the party's compliance with an order from a court of competent jurisdiction restraining the party from performing the agreement. Consequently, the issue of whether the appellant had deliberately failed to yield possession of the property or not was put in serious contention, both factually and legally. This could not be determined on the information available before the court. There was need for a full investigation which could only be done through a trial. On this point alone, summary judgment was not tenable.

Further, we do not agree that the appellant's taking out of third party proceedings against Chloride Batteries Malawi Limited constituted an admission of the respondents' claims. It must be remembered that third party procedure allows a party to be added to an action where the third party's liability is merely contingent upon the defendant's liability. This procedure allows the liability between the plaintiff and defendant, and defendant and the third party to be determined concurrently in the same action. Obviously, there can be no judgment against the third party unless there is a judgment against the defendant. There is need for a connection between all the claims. Although the claims are heard concurrently, a third party claim is still separate and independent of the action between the plaintiff and the defendant. See *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* [2010] VSCA 355. Thus, it is difficult to appreciate the respondent's contention that the third party proceedings in the court below constituted an admission of their claims by the appellant. All we see is that the appellant was only taking advantage of an established procedure which allows the case commenced against it to be determined concurrently with its claim for indemnity against the third party. We do not see any unequivocal admission of the respondents' claim in this process.

Lastly but not least, the respondents' claim for K145,074,000 loss of profits, though so specified and/or named as a definite figure, was in essence a claim for unliquidated damages which required further investigation beyond mere calculation in order to ascertain it. It was not a claim for liquidated damages. There was need for the respondents to prove that they had indeed lost that much as a result of the alleged delay in the yielding of possession of the property. This could only have been done through an assessment of damages proceeding. We find that the judge erred when he entered final judgment for K145,074,000 which amount was for a claim for unliquidated damages that had not been assessed.

On the foregoing, we find that the judge in the court below did not apply his mind to the relevant provisions of the Rules and the principles applicable

on an application for summary judgment and judgment on admission. This lapse is also manifested in the nature of the judgment he rendered. A serious error of law was committed. For these reasons this appeal succeeds in its entirety. The judgment entered by the court below is hereby set aside. The matter is remitted to the court below for continuation to trial before another judge. The costs of the appeal are for the appellant.

Kamanga JA,

My Lords, I too have had the advantage of reading in draft the opinion of Katsala JA, and for the reasons which he gives, with which I fully agree, I too would allow this appeal.

Mkandawire JA,

My Lords and My Lady, I have had the advantage of reading in draft the opinion Katsala JA, and for the reasons which he gives, with which I fully agree, I too would allow this appeal.

Pronounced at Blantyre this 30th day of November, 2021.



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HON. JUSTICE R.R. MZIKAMANDA SC, JA

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HON. JUSTICE L.P. CHIKOPA SC, JA

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HON. JUSTICE F.E. KAPANDA SC, JA



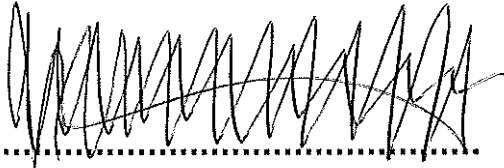
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