MALAWI JUDICIARY

IN THE SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 10 OF 2020

(Being Commercial Cause No. 303 of 2016, High Court Commercial Division, Blantyre)

BETWEEN

CDH CAPITAL LIMITED----------1ST APPELLANT

CONTINENTAL ASSET MANAGEMENT LIMITED-------2ND APPELLANT

-AND-

FELIX MLUSU----------RESPONDENT

CORAM: HON. THE CHIEF JUSTICE A.K.C. NYIRENDA SC, JA

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 I.C. KAMANGA JA

HON. JUSTICE M.C.C. MKANDAWIRE JA

Mpaka----------Counsel for the Appellants

Nkhono SC,----------Counsel for the Respondent

S. Maiden----------Judicial Research Officer

Masiyano----------Recording Officer

Musimuko/Chiusiwa----------Reporter

JUDGMENT

MKANDAWIRE JA

Introduction

My Lords and My Lady,

1. This is an appeal against the judgment of Honourable Justice Dr M.C. Mtambo delivered on 4th September 2019 and the ruling of the Assistant Registrar D.H. Sankhulani dated 14th February 2020. His Lordship found in favour of the respondent in the action the respondent brought against the appellant in the Commercial Division of the High Court.

2. The appellants were dissatisfied with the judgment and they appealed to this court on a number of grounds. The appellants were also dissatisfied with the ruling/order of the Assistant Registrar and they also appealed to this court on a number of grounds. The appellants seek reversal of the whole decision and that judgment be entered in their favour.

Factual Background

3. The appellants are sister companies in CDH financial services. The respondent was prior to his retirement in 2015, Managing Director of NICO Holdings Ltd. This action in the court below was commenced by the respondent by way of summons and amended statement of claim. The respondent claimed against the appellants the sum of Mk17,006,259.64 interest and collection costs which sum he alleged was paid unwillingly to the defendants so that he could access his terminal benefits at NICO Holdings which the appellants in an earlier matter, Commercial Case No. 136 of 2016, had frozen to enable them recover an outstanding debt from the respondent. The respondent asserted that all outstanding sums owed by him to the appellants were paid through a sale of his 7,000 shares by agreement dated 20th April 2016 at 20 tambala each and as such, it was wrongful for the appellants to extract the sum of Mk17,006,259.64 subsequently vide a consent agreement.

4.The Respondent asserted that on or about 20th may 2015, he offered to the appellants his 10,000,000 NICO Holdings plc shares for sale. By a facility letter dated 2nd June 2015, the 1st appellant offered the respondent a loan in the sum of Mk210,000,000 against the shares. By clause 3.0 of the facility agreement, the tenor

of the loan was described as 180 days from the date of disbursement with a final maturity date of 30th November 2015.

5.The respondent contended that by a letter dated 20th April 2016, the parties agreed that the remainder of the shares to the tune of 7,000, be transferred to the appellants at MK24.00 per share in order to settle the loan with them. These shares were however sold at a price below Mk22.00 per share. The appellants' position on the letter was that it was a mere offer which they did not accept, not an agreement.

6. Following a full trial, the court delivered its judgment on 4th day of September 2019 in favour of the respondent. The court below held that the letter of 20th April 2016 constituted an agreement to buy the Respondent's 7,000 shares at MK24.00 per share. It was further held that any fall in the value of the shares after that date is to the account of the 2nd appellant. The respondent fully discharged the debt by payment to the account of the 2nd appellant. The respondent fully discharged the debt by payment of the sum of Mk16,304,708.82 through his cheque dated 30th June 2016. The court also held that the issue of duress does not arise as the respondent did not rely on it. The court found that the 2nd appellant extracted from the respondent the sum of MK17,006,239 in circumstances which oblige them to refund it. The appellants were condemned to pay costs.

7. Following this judgment, the Registrar of the court below took an assessment of interest proceedings and delivered his decision against the appellants. Being dissatisfied with the judgment of the court below and the ruling of the Assistant Registrar, the appellants lodged this appeal.

Grounds of Appeal

8. There are eleven(11) grounds of appeal which are as follows:

1) The Honourable Judge in the court below erred in holding that the question of duress did not arise in the proceedings between the parties in the court below.

2) The Honourable Judge in the court below erred in holding that the respondent did not seek to set aside the Consent Order of 21st July 2016 in Commercial Cause NO. 136 although the respondent sought and the court directed a refund of sums paid by the respondent to the appellant thereby effectively setting aside clause 1 and 3 of the agreement constituted in the said Consent Order.

3) The Honourable Judge in the Court below erred in directing a refund of sums of money paid by the respondent to the appellants under the Consent Order of 21st July 2016 in Commercial Cause NO. 136 of 2016 without making any finding and/or when there was no evidence on which to base any finding that the respondent paid the sums to the appellant under any vitiating circumstances pleaded by the respondent.

4) The Honourable Judge in the Court below erred in implicitly holding that under the Consent Order of 21st July 2016 in Commercial Cause NO. 136 of 2016 the respondent was entitled to a refund of the sums paid thereunder without proof of the pleaded duress and/or compulsion a vitiating circumstance.

5) The Honourable Judge in the court below erred in law and fact to effectively hold that the letter of 20th April 2016 between the parties constituted a binding agreement independent of the parties' loan agreement of 2nd June 2015.

6) The Honourable Judge in the court below erred in law and fact to effectively hold that the letter of 20th April 2016 between the parties constituted a binding agreement independent of the parties' loan agreement of 2nd June of 2015 without identifying the requisite consideration in respect of the said letter as an independent contract.

7) Having effectively decided that the letter of 20th April 2016 constituted an agreement independent of the parties' loan agreement of 2nd June 2015, the court below erred in failing to make findings on whether the respondent had acted on the terms of the said letter so as to bind the appellants thereto.

8) The Honourable Judge in the court below erred in failing to make a finding on what constituted the residual balance on the respondent's account after setting off the proceeds from the sale of the shares at the time of the respondent's payment of MK16, 304, 708.82 on 30th June 2016.

9) The Honourable Judge in the court below erred in law to hold that the respondent fully discharged his debt by payment of the sum of MK16, 304, 708.82 on 30th June 2016.

10) The Honourable Judge in the court below erred in fact and law by effectively awarding payment to the respondent of interest at 5% above base rate and collection costs at 15% of the sums ordered to be paid to the respondent.

11) The decision of the court below was against the weight of the evidence received at trial.

9. The appellants sought the following reliefs from the court:

a) Reversal of the High Court Judgment in its entirety.

b) An order directing refund of all sums paid by the appellants to the respondent under the judgment of the court below such sums to be paid with interest at the rate of 182 Treasury Bill rate plus 600 basis point making an effective rate of 31.5 % but floating from the date of satisfaction of the High Court Judgment to the date of payment back by the respondent to the appellants.

c) An order of costs including collection costs for the funds to be recovered, if and as may be granted, under clause 4(b) in favour of the appellant in the Supreme Court of Appeal and the court below.

10. The appellant in February 2020 dissatisfied with the decision of the High Court, Commercial Division contained in the Ruling on assessment of interest made before His Honour Dick Sankhulani on 14th February 2020 appealed to the Supreme Court of Appeal. The grounds of appeal were as follows:

i) The court below erred in law in failing to construe the judgement on its clear terms and/or its reasoning and the court erred by reference to pleadings in seeking to construe the trial judgment and acted in disregard of the Principle with respect to construction of court judgments.

ii) The court below erred in law and in fact and acted contrary to principles and to its jurisdiction on an application on a proceeding for assessment of interest in construing the trial judgment as awarding interest and in failing to dismiss the application in a proceeding for assessment proceeding for assessment of interest in its entirety with costs and in directing further assessment proceedings having found that the claimant failed to make out a case of MK27, 216, 657.79 claimed at the initial assessment trial.

iii) The decision of the court below at the application in a proceeding for assessment of interest was against the weight of the evidence received at the assessment trial.

11. The appellant sought the following reliefs-

i) Reversal of the High Court Judgment in its entirety.

ii) An order directing a refund of all sums to be paid if at all, by the Appellant to the respondent under any order subsequent to the Ruling of 14th February 2020 such refund to be paid with interest at the rate of 182 Treasury Bill rate plus 600 basic

point making an effective rate of 31.5% but floating from the date of satisfaction of the High Court judgment to the date of payment back by the Respondent to the Appellants.

iii) An order of costs including collection costs for the funds to be recovered if and as may be granted, under clause 4(b) in favour of the Appellant in the Supreme Court of Appeal and in the court below.

The Framing of Grounds of Appeal

12. Before we could proceed hearing the substantive appeal, the court engaged the appellants' Counsel if the grounds of appeal were properly drafted as required by Order III Rules 2,3 and 4 of the Rules of the Supreme Court of Appeal Rules. Counsel for the appellants addressed the court at some considerable length on this issue. As per the first notice of appeal[1], it is clear that in view of the recent decision of this court[2] the requirement under Order III Rules 2, 3 and 4 of the Rules of the Supreme Court is that the Appellant must specifically indicate if it is raising a point of law or a point of fact. Counsel for the Appellants conceded that most of the grounds of appeal as drafted on pages 4-7 are so broad and do not meet the requirements of Order III of the Supreme Court of Appeal Rules to that extent, Counsel said that these grounds of appeal would indeed be subject to question. With regards to grounds of appeal against the Ruling of the Registrar[3] which relate to the award of interest, it is clear that grounds 1 and 2 clearly indicate that the errors were errors of law and fact. As such, the appellant would be saved on that notice.

13. Counsel for the appellants invited us to observe that the Respondent had been fully able to respond to the appeal. That there is no query that the meaning of the issues in dispute is lost since the parties are able to understand the questions that need to be resolved before this court, this court should proceed to hear the appeal and that the court should be able to deliver justice.

14. It is the Appellants' view that from the **JTI –vs- Kad Kapachika** case, [4] as well as other decisions that this court has recently made on how to draft grounds of appeal in compliance with Order III of the Supreme Court of Appeal Rules, the court did

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[1] Pages 4-7 of the Court Record
[2] JTI Leaf (Malawi) Limited –vs-Kad Kapachika MSCA NO 52 of 2016(Unreported)
[3] Page 223 of the Court Record
[4] ibid

not bring to bear the terms of Order V Rule 1 of the the Supreme Court of Appeal Rules which deals with non-compliance. Order V Rule 1 provides:

"Non-compliance on the part of the appellant with these Rules or any rule of practice for the time being in force shall not prevent the further prosecution of the appeal if the court considers that it is in the interest of justice that non-compliance be waived or the appellant given a further opportunity to comply with the Rules. The Registrar shall forthwith notify the appellant of any decisions given by the Court under this Rule, where the appellant was not present at the time when such directions were given."

15. The appellants further submitted that Order V Rule 1 is essentially to the effect that the court will not turn down the appeal because of non-compliance. The court should also take into account Section 22 of the Supreme Court of Appeal Act[5]. This section basically invites the court to advance whatever is necessary in the interest of justice. Counsel emphasized that there is double reference to the interest of justice in section 22(1) (b) (d) of the Supreme Court of Appeal Act. It provides as follows:

"22.(1) On the hearing of an appeal from any judgment of the High Court in a civil matter, the Court-

(a) shall have power to confirm, vary, amend or set aside the judgment or give such judgment as the case may require;

(b) may, if it thinks it necessary or expedient in the interest of justice (underlining is ours)-

(i) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;

(ii) order any witness who would have been a compellable witness at the trial to attend and be examined before the court, whether he was or was not called at the trial or order the examination of any such witness to be conducted in a manner provided by rules of court before any member of the Court or before any officer of the court or other person appointed by the Court for the purpose, and allow the submission of any deposition so taken as evidence before the Court;

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[5] Cap 3:01 of the Laws of Malawi

(iii) receive the evidence, if tendered, of any witness (including any party) who is a competent but compellable witness, and, if a party makes an application for the purpose, of the husband or wife of that party;

(iv) remit the case to the High Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as appear to it necessary;

(c) shall, if it appears to the Court that a new trial should be heard, have power to set aside the judgment appealed against and order that a new trial be held;

(d) may make such other order as the interest of justice may require (underlining is ours);

(2) Whenever the Court gives instructions for the taking of further evidence, it shall make such order as will secure an opportunity to the parties to the proceedings to examine every witness whose evidence is taken.

16. In conclusion, Counsel for the appellants conceded that the court should be stringent. He however said that in doing that, the Court should bear in mind that its responsibility derives from Section 9 of the constitution. This section saddles the judiciary with the responsibility of interpreting, protecting and enforcing this constitution and all laws with regard only to legally relevant facts. This responsibility transcends to section 22 of the Supreme Court Act and Order V Rule 1 of the Rules of the Supreme Court.

17. Counsel submitted that in looking at the interest of justice, this means that the court should look at what the parties to the case have done up to the point of hearing the appeal. In other words, has there been any confusion to the parties in the way the grounds of appeal were drafted? With regards to the instant case, it was argued that there is no confusion. That both parties were aware of the central issues and that all that they need is assistance from the court. Nobody has suffered prejudice just because the grounds of appeal have omitted to refer to the words such as error of fact or error of law.

18. Counsel further submitted that both parties have been able to address the court on each and every ground of appeal. In the event that the court is not able to deliver justice, that is why Order V Rule 1 provides that the appellant be given further opportunity to comply with the rules.

19. The respondent's counsel made a brief response. Counsel said that they had not said anything on the way the grounds of appeal were drafted because it was their view that this is an area which is undergoing a lot of activity on the part of the court. In recent times, this court has given guidance in regard to drafting of grounds of appeal. That the guidance from the court helps those at the bar to comply with the rules.

20. Respondent's counsel concurred with the appellants' submissions that the interest of justice always depends on circumstances of each case and that the court will have to look at the circumstances as a whole and make a decision whether interest of justice has been harmed or not. The fact however remains that the grounds of appeal have to be properly drafted. In conclusion, counsel submitted that this court has to take a strict approach in making sure that the rules have been complied with.

Looking at grounds of appeal

21. As per the notice of appeal, initially the appellants raised eleven (11) grounds of appeal in the matter. Our preliminary survey of these grounds of appeal has given us some anxiety and misgivings about the manner in which the majority of them were framed. In the case of **JTI Leaf (Malawi) Limited vs Kad Kapachika**[6] This court had this to say:

"The framing of the grounds of appeal is an area governed by rules of procedure. Bearing these rules in mind, we have wondered whether some of the grounds of appeal that have been tabled before us are up to the standard that is set and expected by the law. It is for this reason that we found that it would be prudent for us to go through the process of first vetting each of the argued ground of appeal against the applicable rules before we can commit ourselves to determining any particular ground(s).

We shall thus have to so proceed because it is our belief that the rules that are available for the framing grounds of appeal were not put into the procedures of this court for decorative purposes. They were meant to be followed, and they were for the purpose of making appeals understandable and thus easing the work of the court, as well as that of the parties in the handling of the appeals they relate to. It is this

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[6] Supra

exercise, we trust, that will help us to determine, in a sound and reliable way, whether the *prima facie* anxiety and misgivings we have entertained with some of the appellant's grounds of appeal are, or are not, well founded."

22. It is our considered view that indeed the rules that are available for the framing of the grounds of appeal were put there for a purpose. These rules were meant to be followed by the court users. These rules have to be followed to the letter.

Order III rule 2 of the Supreme Court of Appeal Rules

23. The starting point is Order III rule 2 of the Supreme Court of Appeal Rules (hereinafter referred to as the SCA Rules). This legal provision is directly material and relevant in this vetting exercise. In the case of **Dzinyemba t/a Tirza Enterprises-vs- Total (Malawi) Ltd**[7] we emphasized and demonstrated that it is vitally important that appellants observe and conform with this provision whenever they are faced with an obligation to draw up grounds of appeal in matters that are to come to this court. If the appellants choose to ignore requirements this provision has elaborately laid down, they do so at their own risk. It should be made clear that in such event, it is open to the court to find the filed grounds of appeal wanting.

24. Starting with sub-rule 2 of the Order and rule in issue, it will be seen that it is a legal requirement that whenever an appellant intends in a ground of appeal to allege a misdirection or an error of law, that such party must clearly state the particulars of such a misdirection or error. Therefore, for any appellant to merely assert a misdirection or an error of law, without due particulars of such a misdirection or error, is wrong. Such an assertion raises an empty ground of appeal.

25. The next provision is sub-rule (3) of the same Order which has been couched in the pre-emptory words: "The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively" (emphasis supplied).

26. Our view is that what this sub-rule demands is so blunt and clear that it leaves no room for doubt or speculation. An appellant that does not comply with this rule ought to know that he/she is doing what is not permissible. Such an appellant should be ready for the consequences.

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[7] MSAC Civil Appeal No. 6 of 2013

27. In the case of **Professor A. Mutharika and Electoral Commission-vs- Dr. Saulos K. Chilima and Dr Lazarus M. Chakwera**[8] this court emphasized the importance of appellants conforming to the requirements of Order 111 rule 2 of the Supreme Court of Appeal Rules. In this case the court stated:

"In **Dzinyemba t/a Tirza Enterprises v Total (Mw) Ltd** MSCA Civil Appeal No. 6 of 2013 (unreported), this court emphasized that grounds of appeal must conform to the requirements of Order 111 rule 2 of the Supreme Court of Appeal Rules. The rules require that the grounds must be precise and concise; they must not be argumentative; and that the grounds of appeal must state clearly whether they are based on law or facts, so that this Court and the other party (or parties) to the proceedings are able to appreciate precisely what the appellant is appealing against. This Court also emphasized that the grounds of appeal that do not comply with Order 111 rule 2 of the Supreme Court of Appeal Rules may be struck out by the Court on its own motion or on application by a respondent in the proceedings." (Emphasis supplied)

28. It is to be observed that under its sub-rule (4) save for allowing an exception on issues of weight of evidence, this provision does not permit for the filing of any ground of appeal that is vague or which is in general terms, or one which does not disclose reasonable ground of appeal. The court has got the power to struck off such a ground either of the court's own motion or on an application for such a remedy.

Vetting the grounds of appeal

29. Going through the grounds of appeal filed in the notice of appeal in this matter, it is very clear that there was substantial non-compliance with Order 111 rule 2,3 and 4 of the Supreme Court Rules. We have also looked at other considerations underpinning our decision. Our view is that this matter is not the first one in which this court has articulated what is required of any appellant when preparing grounds of appeal. We have in several decided cases guided parties to proceedings on the mandatory requirements of Order 111 rule 2 of the Supreme Court of Appeal Rules. We can therefore have no lenient approach to non-compliance with the Rules of Procedure. Litigants especially where represented by counsel, should thoroughly inform themselves of the provisions of the statute and the Rules and heed the warning expressed in the judgments of this court. The Supreme Court of Appeal is the highest court of the land. It is therefore expected that those who have audience

[8] MSCA Court Appeal No 01 of 2020

before it should be very conversant of the Rules and Procedure before it and its jurisprudence. No leniency should be expected except on good cause shown. Such good cause has not been shown by the Appellants' counsel. The grounds of appeal should be clear not only to both counsel, but more important to the court because it is the court that has to dispense justice. It is therefore not in the interest of justice to entertain grounds of appeal which are argumentative and convoluted.

30. We have looked at section 22(3) of the Supreme Court of Appeal Act and Order 111 rule 5 of the Rules of the Supreme Court. We however do not find any justification in accepting such sloppy drafting of the grounds of appeal as they appear in this case with a view to invoke the above provisions.

31. With regard to section 9 of the constitution referred to by the Appellants' counsel, we intend no disrespect to counsel if we do not spend as much time and space to this point as he did. The short answer to his reference to section 9 of the constitution reminding us about our responsibility as set down by the supreme law of the land is that we do not really see any link between this provision and counsel's responsibility to draft grounds of appeal as required by the statute in this case the Supreme Court Rules. As a court, we fully embrace the spirit of section 9 of the constitution. This provision is actually our beacon in whatever we do in the administration of justice in this country.

32. It is clear that grounds 1, 2, 3, 4, 7 and 8 do not direct the Court on whether the error is based on law or fact. These grounds of appeal do not comply with the rules and the test set out by this court in the **Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd**[9] and **Professor Arthur Peter Mutharika and Dr. Saulos Klaus Chilima and Dr. Lazarus McCarthy Chakwera.**[10] Only grounds 5, 6, 9 and 10 refer to erred in fact and law. The Court strikes out these grounds of appeal. The court will therefore only deal with grounds 5, 6, 9 and 10. The court will also deal with the grounds of appeal in relation to the ruling of the Hon Assistant Registrar. We therefore re-arrange the surviving grounds of appeal. What were grounds 5, 6, 9 and 10 of appeal have now become grounds 1, 2, 3, and 4 respectively. In relation to the grounds of appeal against the ruling of the Hon. Assistant Registrar, they remain the same.

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[9] (Supra)
[10] (Supra)

Issues for determination

33. As this court understands it, the issues that arise and fall to be decided in the appeal under consideration by the court are as follows:

1. Whether or not the letter of 20th April 2016 between the parties in this matter constituted a binding agreement independent of the parties' loan agreement of 2nd June 2015?

2. Whether or not the letter of 20th April 2016 between the parties' in this matter constituted a binding agreement independent of the parties' loan agreement of 2nd June 2015 without identifying the requisite consideration in respect of the said letter as an independent contract?

3. Whether or not in this matter the respondent fully discharged his debt by payment of the sum of MK16, 304, 708. 82t.

4. Whether or not the court below failed to consider the judgment on its clear terms and/or its reasoning by reference to pleadings in seeking to construe the trial judgment and acted in disregard of the principle with respect to construction of civil judgments?

5. Whether or not the court below acted contrary to principles and to its jurisdiction on an application on a proceeding for assessment of interest in construing the trial judgment as awarding interest and in failing to dismiss the application in a proceeding for assessment of interest in its entirety with costs and in directing further assessment proceeding having found that the claimant failed to make a case of Mk27, 216, 657.79 claimed at initial assessment trial?

It is now imperative that this court should now look at the arguments that have been raised by the parties in response to these questions. We shall first look at the appellants' arguments then navigate to those put forward by the respondent.

The Appellants Position

34. In arguing the first ground, the appellants argued that throughout their dealings, the partys' respective duties and obligations remained the same as contained in their written and signed agreement of 2nd June 2015. That all that was before the court was an agreement dully signed by the parties including Dr Mlusu (the respondent)

and fixing the extent and parameters of his obligations. The appellant submitted that under the rule in **L' Estrange GranCob Limited**[11] the binding effect of a signed contractual document containing the terms of a contract cannot be overcome by the record of what transpired at the meeting of 20th April 2016.

35. It was further submitted that under the parole evidence rule, the respondent cannot disown the express text of the document he duly signed for. His obligation set in the 2nd of June 2015 letter are not and cannot be in dispute. The fact that the letter of 20th April 2016 only records what transpired at the meeting of 19th April cannot be disputed either. That the letter is there for the court to see. It could not be said without violating the parole evidence rule,[12] that there is more that happened which is not recorded when in fact both parties signed for the 20th April 2016 letter as recording what in fact transpired.

36. The appellants argued that on the elements of the contract, namely offer, acceptance, consideration and intention to create legal relations, these cannot be satisfied on the plain reading of the 20th April 2016 letter especially when all we have is the identification of the status of the account, proposal for containing the growing liability, inaction on the proposal by the proposer and an express rejection of and counter claim proposal by CAM on the key proposal made by the respondent.

37. In respect of the order pronounced before the Assistant Registrar of the 14th February 2020, as an extension of the judgment on liability, it is the appellants' case that the respondent did not make out any case for interest let alone at Mk27, 216, 657.79. The appellants argued that it is now settled law that a judgment speaks for itself. That unless there is an ambiguity, an order of the court is to be taken as it is. Not even pleadings nor the action can be used to construe a judgment contrary to clear meaning. In buttressing the point, the appellant cited the cases of **Gordon vs Gonda**[13] and **Souci Limited vs VRL Services Limited.**[14]

38. The appellants submitted that the judgment of Dr Mtambo J is very clear. It did not award any interest let alone monthly compound interest at 5% above the National Bank of Malawi base lending rate for any period.

39. The appellant further argued that a referral tribunal has no jurisdiction to embark on business other than the business refereed to. The appellant referred to the case of

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[11] [1934] 2KB 394

[12] See NBS Bank Ltd vs BP Malawi Ltd [2008] MLR (Comm)

[13] [1955] 1 All ER 762 at 765

[14] Civil Appeal No 83/2009(Supreme Court of Jamaica)

Repatriation Commission vs Lionel Nation.[15] In the case of a Registrar, the Courts (High Court) (Civil Procedure) Rules 2017 says in Order 25 rule 1 that " the Registrar may exercise the jurisdiction, powers and functions of the court in assessment of damages subject to the directions of the Judge." It was therefore argued by the appellants that without any direction from Hon. Justice Dr M.C. Mtambo in his judgment awarding interest to be assessed, the Assistant Registrar could not sit on assessment of interest in the court below.

40. The appellants submitted that the trial judge identified the issues in his judgment. The question of whether the sum of MK17,006,239.64 was payable with any interest, did not appear to the judge as a question in issue. In evaluating the evidence and coming up with a judgment, before drawing the conclusion and order in the last two paragraphs of the judgment the Judge said: "It is therefore clear that the 2nd Defendant extracted from the claimant the sum of Mk17,006, 239.64 in circumstances which oblige it to refund it on the foregoing, the Claimant succeeds with costs." The appellants submit that if for the same reasoning the judge had intended to award Mk17,006,239.64 with interest he could have easily said that the claimant succeeds with interest and costs or something like that and could have identified the type of interest and the manner of its calculation.

The Respondent's Arguments

41. In arguing grounds 1, 2, 3 and 4 as re-arranged, the respondent commenced by refering to **Chitty on Contracts-General Principles** 26th Edition at paragraphs 1601. As stated in this book, an agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other. For example, the alteration of the money of account in a contract proposed or made by one party and accepted by the other is binding on both parties since either may benefit from the variation. Alternatively, consideration may be found in the assumption of additional obligations.

42. The respondent submitted that it is evident from the letter dated 20th April 2016 at page 57 of the record of appeal, that the respondent undertook additional obligation as stated in paragraphs 2 to 6 of the letter dated 20th April 2016 including obligations on the part of the respondent to open an investment account with the appellants. It is the respondent's submission that the agreement herein was supported

[15] [1955] FCA 1277

by consideration. For the reasons stated above, the respondent submitted that the court below did not err in finding that the respondent herein fully discharged his debt by payment of the sum of MK16, 304, 708.82. It is clear from the letter dated 20th April 2016 that the outstanding balance on the loan facility was MK16, 304, 708.82. Therefore, by paying the said sum, the respondent's debt herein was discharged.

43. On the issue of assessment of interest, the respondent argued that the assessment of interest in the court below went on the basis of the judgment of the court dated 4th September 2019. On page 1 of the judgment dated 4th of September 2019, his Lordship Justice Dr. Mtambo observed that:

"The action was commenced by way of summons and amended statement of case. The claimant claims against the defendants the sum of Mk17, 006, 239.64, interest and collection costs which sum he alleges was paid unwillingly to the defendants so that he could access his terminal benefits at NICO Holdings which the defendants in an earlier matter, Commercial Case No. 136 of 2016 had frozen to enable them to recover an outstanding debt from him."

44. The respondent argued that in paragraph 21 of his amended statement of case, in the court below dated 31st December 2016 the respondent claimed:

i) the sum of MK17, 006, 239.64;

ii) compound interest on the said sum of Mk17, 006, 239.64 at the rate of 5% above the prevailing commercial bank lending rates from 18th July 2016 to the date of payment;

iii) the sum of Mk2, 550, 935.00 being 15% collection costs on the sum of MK17, 006, 239.54;

iv) 15% legal costs on all sums to be found in (i) and (ii) above; and

V) costs of this action.

45. The respondent submitted that the reliefs the respondent was looking for had been set out in the respondent's statement of claim in the court below and it clearly sets out a claim of interest. The court below in its judgment also acknowledged the claim for interest made by the respondent.

46. It is the respondent's contention that a reading of the respondent's statement of case, in the court below, shows that everything that the respondent claimed against the appellants, the compound interest and collection costs emanated from the

appellants, wrongful retention from the respondent of the sum of MK17, 006, 239.64. The purpose of claiming compound interest was to ensure that the sum of MK17, 006, 239.64 was kept at its real value and to compensate the respondent for the time the appellants wrongfully deprived him of the sum of Mk17, 006, 239.64. The respondent argued that if the court below had intended to dismiss the respondent's claim for compound interest and collection costs it could have clearly done so. The court below must therefore be seen to have been pronouncing its judgment on the respondent's statement of case. It is the respondent's view that this is consistent with the principle that pleadings set the agenda of the court, define the issues and bind not only the parties but also the court itself as per the case of **Malawi Railways Limited vs Nyasulu.**[16]

47. It is further argued that even though in the statement of case in the court below, the respondent specifically claimed collection costs and compound interest at the rate of 5% above the commercial bank lending rates from 18th July 2016 to the date of payment, the appellant did not specifically deny those. It is submitted that by paragraphs 20 and 21 of the respondent's amended statement of case, found at page 29 of record of appeal, the respondent had specifically claimed collection costs of 15% and compound interest at 5% above the prevailing commercial bank lending rates. The appellants had pleaded to paragraph 20 of the amended statement of case in paragraph 4 of their defence, found at page 35 of the record of appeal, and did not in that paragraph deny the respondent's claim for compound interest and collection costs.

48. To further cement its arguments the respondent referred to Order 7 of the Courts (High Court) (Civil Procedure) Rules, 2017. The respondent said that a defence is a statement of case for the defence. Order 7 rule 1 of the Civil Procedure Rules 2017 provides as follows:

"A statement of case shall:

a) Set out the material facts between the parties as each party sees them;

b) Show the areas where the parties agree;

c) Show the areas where the parties disagree that need to be decided by the court;

d) State specifically any fact that if not stated specifically, it would take another party by surprise.

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[16] [1998] MLR 195 at 200-201.

49. The respondent submitted that Order 7 rules (6) and (8) of the Civil Procedure Rules 2017 further provides that:

(6) A defendant shall deal with each fact in the claim and shall not deny the claim generally.

(8) Where the defendant does not deny a particular fact the defence shall be taken to agree with the fact."

50. It is the respondent's submission that since the appellants had not placed these questions as issues in defence, that is why the court below did not include the questions of collection costs and compound interest when setting out issues for determination. By not specifically raising collection costs and compound interest as pleaded as issues in the proceedings, the appellants indicated that they accept those claims subject the court finding them liable to pay the sum of MK17, 006, 239.64.

51. Finally, the respondent agreed that during the assessment of interest proceedings, the respondent paraded one witness a Mr Peter Yona. The witness statement of Mr Peter Yona which is exhibit "P.Y.1" at page 197 of the record of appeal indicates that compound interest had been calculated from 18th July 2016 to 20th January 2020 at the lending rate of 5%. It is further submitted that exhibit "P.Y. 2" at page 200 of the record of appeal shows that the calculation used interest rates provided by National Bank of Malawi. The appellants did not suggest that the calculations of interest by the respondent was wrong nor did they place before the court an alternative calculation.

Analysis and Finding

52. The first issue that we have to consider in this matter is whether applying the law and the facts in all circumstance the respondent was entitled to the refund of Mk17, 006, 239.64. This is the issue that is covered in grounds 1, 2 and 3. In a nutshell, the three grounds in 1, 2 and 3 state that:

"The Honourable Judge erred in law and in fact in holding that the letter on 20th April 2016 constituted a binding agreement independent of the parties loan agreement of 2nd June 2015 without identifying the requisite consideration in respect of the said letter as an independent contract." Ground four state that;

"The respondent fully discharged his debt by payment of the sum of Mk16, 304, 708.**82.**"

53. In this matter, we note that the law applicable is that of contract. For a contract to be binding, there should be offer, acceptance and consideration.[17] It is settled as a fact that on 2nd of June 2015, the parties herein entered into a contract. It is also settled as a fact that the respondent defaulted in his obligation to pay back the money that he had borrowed from the appellants. On the 19th of April 2016, the appellants and the respondents met to discuss the respondent's growing liability. The evidence on record does reveal that what transpired in the meeting of 19th April 2016 was reduced into writing by the appellants. On the 20th of April 2016, the appellants wrote the respondents and the letter reads as follows:

"Dear Mr Mlusu,

SETTLEMENT OF YOUR FACILITY WITH CONTINENTAL CAPITAL LIMITED

We refer to our meeting with you on 19th April 2016 in relation to your facility position with Continental Capital Limited and how you intend to settle the amount due. The facility position as at 20th April 2016 was as follows:

Outstanding balance	MK184, 304, 708.82
Value of Collateral 7,000,000 NICO	
Shares @K24.00/share	MK168,000.000.00
Shortfall	MK16, 304, 708.82

We note below your proposal for settlement:

1. You offered Continental Asset Management Limited (CAM) an outright sale of your 7,000,000 (seven million) NICO shares, on share certificate number 11926 in the name of CAM Nominee A/C Felix Mlusu which are in our custody as security for your security with Continental Asset Management at the market price which is currently K24 per share.

2. You undertake to clear the residual balance after setting off the proceeds from the sale of the shares using funds due to you from NICO Holdings Limited before 1st July 2016.

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[17] Storer vs Manchester City Council [1974] 3 ALL ER 304 and Ernest Chatsika vs Blantyer City Assembly [2009] MLR 131

3. You will open an investment account and enter into a portfolio Management agreement with Continental Asset Management Limited.

4. You will issue an irrevocable instruction to NICO Holdings Limited to pay all amounts due to you into your investment account with Continental Asset Management.

5. Your Investment account with Continental Asset Management shall be debited with the residual balance noted in 1 above if it is not settled by the date of receipt of your funds to be received from NICO Holdings Limited.

Please confirm that the above is your understanding of what transpired by signing below.

Yours Sincerely,

Daniel Dunga

General Manager."

Below this letter is a section where the respondent filled and signed. It reads as follows:

"Confirmation of the offer by Mr Felix Mlusu

I, the undersigned hereby confirms my agreement with and acceptance of the foregoing and undertake to carry out the obligation----------

Felix Mlusu 24-6-16

Signed Date

54. The wording of the letter of 20th April 2016 is very clear that the appellants and the respondent made a binding contract. The respondent made a very clear offer and the appellant accepted it. The letter also contained consideration where the respondent was to open an investment account and enter into a portfolio Management with the 2nd appellant. The outstanding balance in the letter was MK184,304,708.82 and the value of the collateral was MK168,000,000.00 leaving a shortfall of MK16, 304,708.82. It is this shortfall that according to the agreement between the parties was to be paid before the 1st July 2016. On 30th June 2016, the respondent paid the shortfall through a cheque. By paying for the shortfall, the respondent discharged all his liabilities under the agreement of 20th April 2016. In

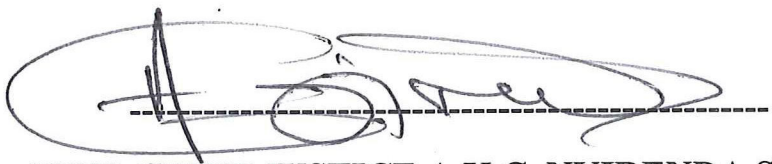
light of the above, we find that the sum of MK17, 006, 239.64 was not part of any agreement amongst the parties.

55. Coming to the issue of interest, by virtue of succeeding in his claim against the appellant, the respondent was entitled to interest. As provided for under Section 65 of the Courts Act, where one succeeds in a civil claim, the judgment sum awarded shall carry interest at the rate of five per centum per annum or such other rate as may be prescribed. This court has confirmed the law in **Dannie Justine Kamwaza & Mavuto Kasowe t/a Kamwaza Design Parrtnership vs ECO Bank**[18] in which it held that where there is no pleading or no proof for claim of interest the claim must fail.

56. It is clear that the respondent had specifically pleaded interest, collection costs and legal costs in the statement of case as amended. This was in compliance with Order 7 of the Courts (High Court) (Civil procedure) Rules 2017. The appellants in the court below did not specifically deny these claims. During assessment of interest, the appellants did not even suggest that the calculations of interest and other ancilliary costs were wrong. We find that it is clear from the wording of the judgment of Justice Dr M. Mtambo that the respondent had succeeded in all the claims that were in the statement of case as amended including the claim of interest, collection costs and legal costs.

57. We therefore uphold the judgment of the court below and we hereby dismiss this appeal in its entirety with costs.

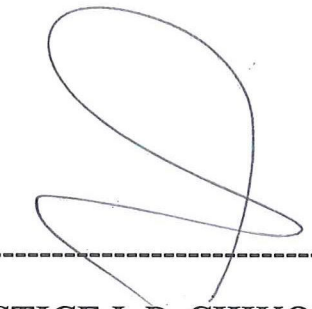
Pronounced at Blantyre this 18th day of July 2023



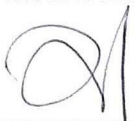
HON. CHIEF JUSTICE A.K.C. NYIRENDA SC, JA

HON. JUSTICE R.R. MZIKAMANDA SC, JA

[18] MSCA Civil Appeal No 45 of 2014



HON. JUSTICE L.P. CHIKOPA SC, JA



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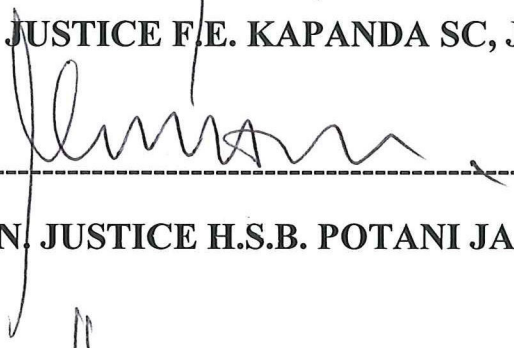
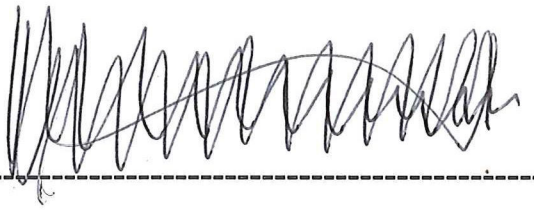


HON. JUSTICE H.S.B. POTANI JA

HON JUSTICE I.C. KAMANGA JA



HON. JUSTICE M.C.C. MKANDAWIRE JA