



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CASE NUMBER 134 OF 2014
(Before Honourable Justice Dr. M. Mtambo)

BETWEEN

NBS BANK LIMITED.....CLAIMANT

AND

ERNEST KAONGA.....1ST DEFENDANT

E AND E CONSTRUCTION LIMITED.....2ND DEFENDANT

NOREEN CHIRWA.....3RD DEFENDANT

Coram: Manda, J
 Machika for the Claimant
 Chidothe for the Defendant
 Kachimanga Court Clerk/Interpreter

JUDGMENT

This matter was before Justice Dr. Mtambo who retired before he could deliver the judgment. The Judge then recently handed over the file to me to proceed to deliver the judgment. Not having heard the matter personally, I must admit that there are challenges in coming up with the judgment but still I endeavoured to come up with a judgment basing on my understanding of the matter. In this regard I must of course thank Counsel from both sides for providing me with electronic copies of the final submissions. Suffice it to say that this matter is simply about money owed.

Introduction

The Claimants brought the action herein against the Defendants claiming for the following:

- (i) Payment of the sum of MK71,705,935.20 from the 1st, 2nd and 3rd Defendants.

- (ii) Interest on the said sum as pleaded under paragraph 30 of Amended Statement of Claim.
- (iii) An order of attachment of the 3rd Defendant's beneficial interest in property Title Number Nyambadwe 358/3 in favour of NBS Bank Limited.
- (iv) Payment of the sum of MK29,081,755.75 from the 1st and 2nd Defendants.
- (v) Interest on the said sum as pleaded under paragraph 31 of the Amended Statement of Claim.
- (vi) An order of delivery of motor vehicles registration numbers BQ 7152 and BQ 7159 to the Claimant by the 1st and 2nd Defendants.
- (vii) General damages for breach of contract from all the Defendants.
- (viii) Exemplary damages for breach of contract from all the Defendants.
- (ix) Costs of this action

The defendant denied the claims

Pleadings

In their Amended Statement of Claim, the Claimant pleaded as follows:

1. The Claimant is a limited company registered in the business of banking under the Banking Act, 2009.
2. The 1st Defendant is the Managing Director and 99% shareholder of the 2nd Defendant.
3. The 2nd Defendant is a limited company in construction business.
4. The 3rd Defendant was at all material times a business friend of the 1st and 2nd Defendants.
5. In or around June, 2010 the Claimant entered into a finance lease agreement amounting to MK20,240,000.00 with the 2nd Defendant for the purchase of two Tipper trucks from Tata Zambia Limited.
6. As security for the loan facility the Claimant endorsed itself as the title holder of the motor vehicle's registration certificates.

7. Further, the Claimant registered a further charge over property on title number Soche West ZG3/16 in the city of Blantyre.
8. Furthermore, in or around March, 2011, NBS Bank Limited entered into a commercial loan agreement amounting to MK11,400,000.00 with E and E Construction Limited.
9. As security to the said loan amount NBS Bank Limited prepared a surety charge over property title number Nyambadwe 358/3 belonging to Aurora Maria Fatima Chirwa.
10. The 3rd Defendant represented herself as the owner and proprietor of property title number Nyambadwe 358/3 and consequently signed and charged her interest over the property to the Claimant.
11. The surety charge over property Title Number Nyambadwe 358/3 was registered on 26th March, 2009 at Blantyre Land Registry as application number 529/200 800/2012 in favour of NBS Bank Limited.
12. The Claimant registered the charge in reliance of the 1st Defendant's presentation of the 3rd Defendant to the Claimant as Aurora Maria Fatima Chirwa and the owner and title holder of the property.
13. The Claimant had no reason to believe the Defendants would defraud the Claimant as the 3rd Defendant signed the charge documents before a notary public who should have verified the identity of the 3rd Defendant.
14. However, in breach of the loan agreement the 2nd Defendant failed to service the loan and the Claimant exercised power of sale over the property following a futile attempt by the 2nd Defendant to obtain an injunction restraining the Claimant from selling the property.
15. The property was eventually sold to a customer in or around September, 2012.
16. However, on 10th December, 2012 Jean Chirwa a sister to the 3rd Defendant and a beneficiary to the estate of Maria Fatima Aurora Chirwa (deceased) brought an action in civil cause number 523 of 2012 against the Claimant together with the 2nd and 3rd Defendants seeking the following reliefs:
 - a. An order rectifying the lands register by removing any existing proprietor and/or encumbrance registration inconsistent with the proprietorship of Maria Fatima Aurora Chirwa in respect of property title number Nyambadwe 358/3.
 - b. A permanent order of injunction restraining the Defendants from registering or causing to be registered any dealing inconsistent with proprietorship of Maria Fatima Aurora Chirwa over property title number Nyambadwe 358/3.

17. The Claimant thereafter established that Maria Fatima Aurora Chirwa died on 31st October, 1999 and the 3rd Defendant knowingly misrepresented herself as the deceased in order to create a charge over the property in favour of the Claimant to secure the loan.
18. Furthermore, the 3rd Defendant together with her siblings were the beneficiaries of the property.
19. The 2nd and 3rd Defendants did not bother to oppose the action and a judgment was entered against them.
20. The matter is still in court against the Claimant and the court is yet to appoint a date of trial. (At this point we were not sure if the matter was still in court)
21. Furthermore, the 2nd Defendant failed to service the lease facility and the 1st Defendant in a private treaty sold the property title number Soche West ZG 3/16.
 - a. The said property was sold after obtaining consent to sale the property from the Claimant and registering a discharge of charge over the property.
22. However, the money realized was not enough to settle the debt and the Claimant failed to repossess motor vehicles BQ 7152 and BQ 7159 because the 1st and 2nd Defendants kept them at undisclosed place.
23. The Claimant has tried different means to recover the same but has failed to date.
24. Therefore, as a result of the Defendants' fraudulent conduct and the injunction the facilities are in heavy arrears and the Claimant is being deprived of its money.

Particulars of the Defendants' fraudulent conduct

- a. The 3rd Defendant did not hold title over property title number Nyambadwe 358/3 and she falsely represented herself to the Bank as Maria Fatima Aurora Chirwa.
- b. The 1st Defendant knew that the 3rd Defendant was not Maria Fatima Aurora Chirwa but he nevertheless signed a charge on behalf of the 2nd Defendant.
- c. In turn the 2nd and 3rd Defendants in or around November, 2008 entered into an agreement whereby the 3rd Defendant was to get a MK3,000,000.00 consideration for the fraudulent transaction.
- d. The 1st Defendant has knowingly and with intent to defraud and prevent repossession by the Claimant of motor vehicles registration numbers BQ 7152 and BQ 7159 kept the same away from the Claimant.

25. The 2nd Defendant obtained money which is due to the Claimant as such it is obliged under law to pay the same to the Claimant.
26. Further, as a result of the 1st and 3rd Defendants' conduct, the Claimant cannot sell the security for the loan and the arrears keep on increasing as the loan is not being serviced and as a result the Claimant is being deprived of both the security and its money.
27. The 2nd Defendant is therefore bound to pay the sum due under the loan agreement regardless of the claim in the matter civil cause number 523 of 2012 before the Principal Registry, High Court in which Jean Chirwa is suing the parties herein for unlawfully creating a surety charge over property Title Number Nyambadwe 358/3 in favour of NBS Bank Limited.
28. The 1st Defendant is further personally liable for the sum due and payable by the 2nd Defendant for defrauding the Claimant in obtaining loan using deceased property.
29. Furthermore, the 3rd Defendant is also personally liable for defrauding the Claimant's as stated above.
30. The Claimant therefore claims from the 1st, 2nd and 3rd Defendants jointly and severally the sum of MK71,705,935.20 being the amount outstanding and due under the commercial loan agreement and 2% above NBS Bank lending rate from the date of filing of this action to the date of actual payment.
31. Further, the Claimant states that it is entitled to the beneficial interest of the 3rd Defendant over property title number Nyambadwe 358/3 since she is one of the beneficiaries under the Will.
32. The Claimant therefore claims from the 1st and 2nd Defendants jointly and severally the sum of MK29,081,755.75 being the amount outstanding and due under the finance lease agreement and 2% above NBS Bank lending rate from the date of filing of this action to the date of actual payment.
33. The Claimant further claims costs of the action to be assessed by

In defence, the Defendants admitted they were granted the loans specified in paragraphs 5 and 8 of the Amended Statement of Claim and the execution of the Securities. Then defendants then simply denied paragraphs 10, 11, 12, 13, 14, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 of the Amended Statement of Claim. Specifically, the Defendants deny the following substantive aspects of the Claimants' claim.

1. THAT the 1st Defendant represented the 3rd Defendant and the 3rd Defendant represented herself during the surety charge transaction as Aurora Maria Fatima Chirwa and owner and title holder of the property subject to the surety charge.
2. THAT the Defendants engaged in fraudulent conduct against the Claimants in respect of the loans and surety charge transaction herein.
3. THAT the 2nd Defendant owes the Claimants the debts as alleged by the Claimants to wit MK71,705,935.05 and MK29,081,755.75 or at all.
4. THAT the Defendants are jointly and severally liable to settle the alleged liability of MK71,705,935.05 plus interest thereof and the 1st and 2nd Defendants are jointly and severally liable to settle the alleged debt of MK29,081,755.75 plus interest thereon.
5. THAT the 1st and 3rd Defendants should be personally liable for the alleged debts that were incurred by the 2nd Defendant.
6. THAT the Claimant can be or is entitled to the beneficial interest of the 3rd Defendant over property title number Nyambadwe 358/3 since she is one of the beneficiaries under the Will.

The Defendants averred that the money realised from the sale of the property title number Soche West ZG 3/16 was sufficient to liquidate the 2nd Defendants' indebtedness to the Claimants.

Evidence and Analysis

Five witnesses gave evidence in this matter, three for the claimant and two in defence. The evidence, in as far as this claim was concerned, was essentially uncontroverted. It was not denied by the 1st and 2nd defendants that they obtained loans from the claimant bank using a house purported to belong to the 3rd defendant as collateral.

It is also not in dispute that there was default on the loans and that the claimant did exercise its power of sale of the collateral but that the sale was nullified by the High Court in suit brought by Jean Chirwa, the sister of the 3rd defendant. In its findings, the court found that the house which the 3rd defendant had offered as collateral for the loans obtained by the 1st and 2nd defendant, did not belong to her but her deceased mother, Aurora Maria Fatima Chirwa. The Court thus found that the 3rd defendant had acted fraudulently.

The position of this matter is thus that money is still owing to the claimant bank. It is also not in dispute that the 1st defendant, by private treaty, sold the property title number Soche West ZG 3/16. It was the assertion of the defence that the proceeds from the sale of that house should

have been able to repay the loan. It must be stated that the property was sold for MK18,000,000.00. While there was the Finance Lease Agreement for the sum of MK20,240,000.00 and there was also a loan MK11,400,000.00. doubtful then if the sale of the house would have repaid the loan, which I am sure had accumulated interest at the time as well. On this note it must be stated that these were loans that were obtained in 2010 and 2011, respectively!

Looking at the defence and the submissions by the defendant's, it is clearly not in dispute that the 1st and 2nd defendant are indeed indebted to the claimant. I have gone through the submissions which were filed by the defendants and I must state that I did find them to be long-winded and quite literally beside the point. If there is an admission of original indebtedness, I do not think that there is need for the claimant to bring more evidence other than what was pleaded and what the witnesses testified, which evidence was uncontroverted.

As for issues of separate legal personality, effects of incorporation, lifting the veil, concurrent ownership, and the like, which were raised by the defendant, they do not have any relevance in this matter. This is especially considering the fact that the 1st defendant was the Managing Director and 99% shareholder of the 2nd defendant. The 1st defendant would thus for all intents and purposes was acting not only as an agent for but also a senior officer in the 2nd defendant, in obtaining the loans. It is a fact that the loans which were obtained the 1st and 2nd defendants are still outstanding to date. This is despite the fact that there was a repayment of MK18, 000, 000.

What is also clear from the evidence is that the collateral that was offered to secure the loans was defective. This is on account of the fact that the property in question did not belong to the 3rd defendant. On this note I would not comment much since there is already a decision of the High Court, which found that the conduct of the third defendant was fraudulent in the manner in which she dealt with her late mother's house.

The only observations I would make is that the claimant never did its due diligence and I must state that that was quite negligent of them. I am of the strong view that the fact that the 1st defendant was presenting collateral that was not in his name should have raised a red flag. In this regard it must be stated that it is a long established principle of law that matrimonial property cannot be used as collateral without the consent of the spouse and that the spouse must have had independent legal advice. The 1st defendant and the 3rd defendant were not even married.

In fact, the evidence is that the 3rd defendant only agreed to offer the house as collateral after she was given money amounting to MK3, 000, 000. Whether this can be deemed as an attempt to defraud the claimant bank by the 3rd defendant, I would wonder. This is especially considering the standard of proof for fraud. It is well established in *Fiona Trust v Privalov* [2010] EWHC 3199 that “cogent evidence is required to justify a finding of fraud or other discreditable conduct.” This is because fraud and dishonesty are both very serious allegations. As such, clearer evidence is required to prove fraud or dishonesty than other torts i.e. negligence or innocence (see also *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 and *Enigma Diagnostics Ltd (In Liquidation) v Harvey Eric Boulter* [2022] CIFsd 23). In any case, in the claimant’s own statement of case, the claimant stated in paragraph 13.

“The Claimant had no reason to believe the Defendants would defraud the Claimant as the 3rd Defendant signed the charge documents before a notary public who should have verified the identity of the 3rd Defendant.”

From the evidence so far before me I must state that I did not find any cogent evidence to justify the finding of fraud. There is no evidence of a conspiracy between the defendants to defraud the claimant and the fact that the 3rd defendant got MK3, 000, 000. 00 is not enough to establish a conspiracy to defraud the claimant (see generally *Belmont Finance Corporation Ltd. v. Williams Furniture Ltd.* [1979] Ch. 250, *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 and *Armitage v Nurse* [1997] EWCA Civ 1279). After all it is a fact for instance that the 1st and 2nd defendants did actually buy the tippers, which was the reason one of the loans was advanced. The fact that the claimant failed to recover the tippers, on account that they were taken out of the jurisdiction does not retroactively establish that there was an intention to defraud.

Conclusion

Having found that there is no cogent evidence of fraud, this matter then remains a case of money owed. In that respect I must state that there is no defence to the fact that the claimant is owed money. All the defendants provided were general denials. I would thus proceed to enter judgment for the claimant for the sums of MK71,705,935.20 and MK29,081,755.75, respectively plus interest at 2% above the claimant’s base lending rate on the sums. The interest would be assessed if not agreed.

As for the claim for an order of attachment of the 3rd Defendant’s beneficial interest in property Title Number Nyambadwe 358/3 in favour of NBS Bank Limited, I find no basis for awarding

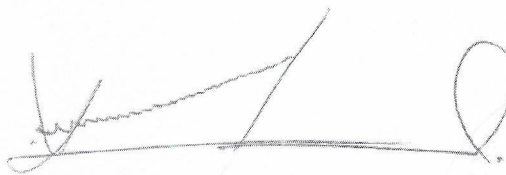
that attachment considering that the property is a family home and to the knowledge of this court, was not being sold. If anything then the claimant can proceed to garnishee the 3rd defendants accounts to recover the money. This claim thus fails.

The claimant also claimed for general and exemplary damages for breach of contract by the defendants. The reality however is that the 1st and 2nd defendants are the ones that borrowed money from the claimant. The defendants defaulted on the repayment of those loans. In contract law, a breach means the failure of a contracting party to perform their obligations according to the terms of the agreement. Default, according to the law of obligations and banking law, means to refuse to pay a debt when due. There is thus a distinction between breach of a contract and default. In this instance there was default and not breach of contract. Further, exemplary damages are intended to punish and are not available for breach of contracts (see *Addis v Gramophone Co. Ltd* [1909] AC 488). Further still, there is no evidence that the defendant calculated that the money to be made from their wrongdoing will probably exceed the damages payable (see *Rookes v Barnard* [1964] AC 1129 and *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29). The claims for general and exemplary damages thus fail. In any case the claimant would be fully compensated by the award of interest.

Finally, in relation to an order of delivery of motor vehicles registration numbers BQ 7152 and BQ 7159 to the Claimant by the 1st and 2nd Defendants. I will proceed to grant the order if the claimant thinks that they would be able to recover the vehicles. I am however of the view that that might be an effort in futility.

The claimant is awarded the costs of the action.

Made in Chambers this.....24thday of.....February.....2024



K.T. MANDA

JUDGE