IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause No. 3076 0f 2001

Between:

M. Mtakatifu.....Plaintiff

And

Small Enterprise Development Organisation Of Malawi (SEDOM).....Defendant

Coram: Honourable Justice A.C. Chipeta
T. Ngwira; Of Counsel for the Plaintiff
Khondiwa; Of Counsel for the Defendant
Mchacha; Official Interpreter

JUDGMENT

This action commenced with issue of Writ on 7th November, 2001. The filing and service of pleadings was somewhat protracted. There have also been a number of amendments to the pleadings. The action arises from the dealings the parties have had with each other in relation to a loan agreement they entered into. Following the arising of differences between them on that subject, each of them is pointing an accusing finger at the other.

The Plaintiff's Amended Writ seeks general damages from the Defendant for breach of contract and for tortuous and unlawful detention of his bluebook. He also seeks to recover the costs of the action. His statement of claim, however, has not been likewise amended. It is to the effect that on 11th November, 1997, as a farmer and businessman, the Plaintiff applied for a loan for purposes of engaging in a new business venture, and that on 24th March (the year has not been specified), the Defendant offered to lend him K51,000.00.

The Plaintiff avers that he accepted the offer of loan herein, and that he paid the fee of K1,785.00 for it, as well as surrendered to the Defendant the bluebook for his motor vehicle registered No. BJ 4903 as security for the said expected loan. He further avers that he got K23,715.00 as first disbursement of the loan, and that despite numerous requests, the balance of the loan was never given to him. It is the Plaintiff's further averment that the Defendant, having breached the agreement, refused to release to him the bluebook for his motor vehicle, which he needed for purposes of obtaining a Certificate of Fitness.

The Plaintiff claims that in the result he has suffered loss and damage. He has particularized the same as comprising of loss of use of the full loan amount, loss of

business due to inadequate capital, loss of use of his motor vehicle, and cost of transport and inconvenience in traveling between Liwonde and Blantyre for more than ten times to check on the balance of the loan. On account of this, the Plaintiff has thus prayed for general damages for breach of contract, specific damages, and also for costs of the action.

Before I can proceed to an examination of the other pleadings, I need to immediately make some observations that I consider to be pertinent *vis –a vis* the Statement of Claim I have just referred to. The term Specific Damages used in the said Statement of Claim, and which does not appear anywhere in the Amended Writ, is not a term of art in Civil Procedure. I tend to believe that the Plaintiff intended to use the more familiar and usual term "Special Damages," and that he somehow fell short of that. Be this as it may, my present concern is much deeper than mere nostalgia for use of correct terms of art, or for correct semantics or language. My real concern is about what I see as a disagreement between the Plaintiff's Writ, as amended on 9th July, 2004, and his Statement of Claim. Whereas the Writ limits the Plaintiff's claims to general damages, the Statement of Claim, it will be noticed, breaks out of these bounds, and extends the Plaintiff's claims to specific, *alias*, special damages.

Order 18 rule 10 of the Rules of Supreme Court would, in my view, appear to be best placed to resolve the kind of problematic situation I have just depicted. A look at this provision will reveal that it does not allow parties to actions to radically depart from their previous pleadings. In an action begun by Writ, the Writ itself is the foundation document of the case in question. Much as it is through a Statement of Claim that a Plaintiff elaborates on the claims he makes in such Writ, the Statement of Claim cannot be used, *per* the above-referred Order and rule, for presentation, *inter alia*, of new or additional claims in the matter.

Originally, the record will reveal, the Plaintiff by his Writ simply claimed damages. By amendment, however, he changed his claim to one for general damages. Incidentally by doing this he, unwittingly perhaps, ended up qualifying more specifically the type of damages he wanted to pursue in the case. It is the rule that every amendment takes effect from the date of the original document it so amends (see: 20/5-8/2 under Order 20 rules 5 and 8 of the Rules of Supreme Court). The amendment of the Writ herein, although done on 9th July, 2004, therefore, took effect as from 7th November, 2001. Accordingly, soon this amendment was made, its effect was to immediately render the claim for specific *(alias special)* damages in the Statement of Claim inconsistent with its parent, to wit, the Writ, which was targeting general damages only.

Considering, therefore, that the claims as pleaded in the Statement of Claim are not compatible with those pleaded in the Writ, the question that immediately arises is what effect this disagreement in the action boils down to. In Civil Cause No. 1401 of 2001 **Downs Stainer Theka vs National Bank of Malawi** (unreported), I luckily had the occasion to discuss these kinds of incompatibilities between pleadings. Employing the reasoning I applied in that case, I must, and I hereby do, find that with the Writ being so clear and limited on the type of damages the Plaintiff is after in the action, it is not open to me in this case to consider, *via* Statement of Claim, damages other than those captured

in the Writ. Specific *(or special)* damages, in particular, as additionally claimed only in the Statement of claim, do not fit into the pigeon holes set by the Writ. Having by overt amendment of the Writ clearly narrowed and limited his claim to general damages only, the Plaintiff's claim for specific *(alias special)* damages in the Statement of Claim became superfluous and extra to the boundaries thus next set by the writ. Accordingly, this additional claim of the Plaintiff falls away by accident of inconsistency in pleadings.

This done, let me now disclose that the Defendant contests the Plaintiff's claim, as well as puts forward its own claims against the Plaintiff. By its Amended Defence, which incorporates a Counterclaim, the Defendant begins with a complaint that the Plaintiff failed to make adequate repayment on the sum of K23,715.00 advanced to him as part of the loan applied for herein. The Defendant hereafter avers that the Plaintiff breached the terms of the Contract the two of them entered into. By way of particularizing the alleged breach, the Defendant claims that the Plaintiff failed to use the money advanced to him for the purpose it was intended, and that he also failed to allow the Defendant to inspect his business premises.

Next, the Defendant asserts in its Defence that on account of this breach on the part of the Plaintiff, it could not release the balance of the loan to him, lest it lose more, and that *per* the Bill of Sale executed by the parties in respect of this loan, it had a right to retain the bluebook for the motor vehicle the Plaintiff pledged as security for the loan herein.

On its part, the Defendant totally denies breaching any Contract, or any Agreement at all, as alleged by the Plaintiff, and accordingly puts him to strict proof of this allegation. Further to this denial, or in the alternative, the Defendant accuses the Plaintiff of failure to take any or any reasonable steps, to mitigate whatever loss or damage, if any, he may have suffered. By reason of this, the Defendant avers that the Plaintiff should not be entitled to claim for the said loss or damage from it. Mitigation of loss or damage, it has been pleaded, could have been managed through proper use of the sums of money already advanced to the Plaintiff, and through securing a loan from another lending institution.

Beyond all this, the Defendant is aggrieved that the part of the loan it disbursed in the matter, to wit the K23,715.00, is not being serviced by the Plaintiff, and that it thus continues to accumulate interest at the rate of 30% *per annum*. It is claimed that in fact by June 30th, 2000 the interest on this sum had accordingly risen to K23,840.10. The Defendant thus, up to 30th June, 2000, counterclaims from the Plaintiff, the principal sum of K23,715,00 and interest thereon in the sum of K23,840.10. It further counterclaims interest at 30% *per annum* from 1st July, 2000 to the date of full payment of its Counterclaim. The Defendant additionally counterclaims the sum of K7,133.27, being collection costs at the rate of 15% of the Counterclaim, and it also claims costs of the action.

It was the evidence of the Plaintiff, who was the sole witness for his side of the case, that having in November, 1997 applied for a loan in the sum of K130,000.00 and paid all due processing fees (exhibits "P 1" and "P 2") , he was on 24th March, 2008 only offered a

loan facility of K51,000.00 (exhibit "P 3") on security of bringing to the Defendant a Bluebook and Certificates of Fitness and Insurance for his Toyota Hilux registered number BJ 4903, along with a Guarantor. Orally, however, he indicated that his car was registered number BK 4903 and not BJ 4903 as reflected in exhibit "P 3" and in the pleadings. He claimed that he duly complied with these demands, and that on 8th May, 1998 received a first disbursement in the sum of K23,715.00 from the Defendant. To this end he exhibited his Commercial Bank Savings Passbook ("P 5"), which on the said date indeed reflects this sum as deposited thereto. The Plaintiff further claimed, on the same occasion, to have been promised disbursement of the balance of the approved loan in two weeks time, the same to be collected from the Defendant's Liwonde offices. He hereafter went to Liwonde, and even to Blantyre, so many times, he said, in pursuit of this loan balance, but to no avail. Yet, he complained, after 4 months from the first disbursement, and without first completing the disbursement of the loan, the Defendant started demanding repayments. He claimed, as a result of this pressure, to have made two payments, but one of his purported receipts (a non-conventional one) was not accepted in evidence, and so the only evidence he put on record in relation to repayments is that of his K2,800.00 payment on 3rd November, 1998 (exhibit "P 13").

The purpose of the loan he got from the Defendant, the Plaintiff indicated, was to venture with the same into the buying of tobacco from farmers for resale at a profit. This dream, he lamented, could not be realized, because it was frustrated by SEDOM's breach of Loan Agreement herein through its failure to disburse to him the approved loan in full. Having spent a major portion of the first disbursement in acquiring items such as a licence, a scale, sack material, and a jack, among others, in preparation for the intended new business, he claims he was left with too little money to start the actual purchases of tobacco. The balance of loan not having ever been paid to him thereafter up to date, and demands to repay the portion of loan disbursed having followed, the Plaintiff said he totally failed to launch his planned business herein.

In the circumstances prevailing, the Plaintiff claimed that he felt that he could best service the loan that had come to hand by hiring out his motor vehicle, but indicated that after 1998 the said vehicle needed a Certificate of Fitness. For this he needed the Bluebook, but the Defendant refused him access to the same, although he needed it for purposes of taking the vehicle for the required tests. As such, the Plaintiff complained that since 1999 he could not use his motor vehicle, and that he could thus not even raise money through other innovative ways to repay portion of loan he got. Thus, both on account of failure to give him the approved loan in full, and in refusing him access to the Bluebook that would have enabled him to have a legitimately mobile car, that could in turn have aided him to raise money in a different way, the Plaintiff claims that he has suffered loss and damage, and that the Defendant should therefore pay him damages. In fact the Plaintiff went to quite some length in his evidence to justify and itemize losses, which strictly would fall in the category of special damages. I have found it unnecessary to recount all this in the light of my earlier holding on the status of the Plaintiff's claim for specific *(alias)* special damages.

On its part, the Defendant also only fielded a single witness to advance its Defence and Counterclaim. This witness was its Loans Clerk, Osman Kumbukani Munthali. His evidence was that he started working with the Defendant on 18th April, 1998. He was first posted to Nsanje. He was, however, on 1st September, 1999 posted to Liwonde, and in the month of December that same year he started visiting the Plaintiff in order to chase the recovery of the outstanding loan. The witness indicated in his evidence that he generally found the Plaintiff uncooperative in this exercise. For example, he said that when he asked him to repay the loan, the man flatly refused to do so. So also, he said, when he next visited the Plaintiff in March, 2000 for the same purpose, he once again refused to pay up. The witness further indicated that when he asked the man to show him what he had done with the money loaned, he was not able to. He thus concluded that the Plaintiff had not used the money for the intended purpose. In July, 2000, DW 1 said he went to the Plaintiff a third time, this time with the aim of seeing the vehicle that had been pledged as security, but the Plaintiff refused to show it to him. Thereafter, the witness said, he referred the matter to the Defendant's Regional Manager (S).

In his final submissions on the matter, the Plaintiff first addressed the question whether the Defendant's failure to disburse the balance of the loan amounted to a breach of Contract. He claimed that in his application for the loan he had sought K30,000.00 for materials and K100,000.00 for purchase of produce. He unfortunately never produced the application form he filled or even a copy thereof. In this regard he blamed the Defendant for not bringing the said application form to the Court when its witness came to testify, but there is no indication that he called for such or subpoenaed for it. He, however, next demonstrated that on his said application only a loan of K51,000.00 was approved by the Defendant and agreed to by him. He thus further claimed that in his understanding, since the bigger sum he had applied for was meant to incorporate both acquisition of materials and purchase of produce, he took it that the loan approved had to cover both.

The Plaintiff next lamented the fact that out of the loan approved, only K23,715.00 was disbursed to him, and that despite the Defendant's promise to disburse the balance after two weeks and his numerous follow-ups on that, that party never hereafter fulfilled the said promise. He next argued that, although the Loan Agreement (exhibit "P 4") does not specify the time full payment was to be effected, in the contract time was of essence. He so argued on account of the loan repayment scheme having been worked out on basis of the full K51,000.00 being taken as disbursed, and that the said repayments were set to start on 1st June, 1998. This aside, the Plaintiff placed reliance on a quotation he took from Kennedy L.J. in **Moel Tryyanship & Company Limited vs Andrew Weir & Company** [1910] 2 KB 844 at 857, to the effect that where a contract does not fix time for performance the law implies, regard being had to the circumstances of the case, that each party undertakes to perform its part within a reasonable time. On the same point the Plaintiff also cited the authority of **British Steel Corporation vs Cleveland Bridge and Enginering Company Limited** [1984] 1 All ER 504. Having regard to the arguments advanced and to the nature of business he needed this loan for, it was the Plaintiff's submission that the Defendant's failure to advance him the full loan that was approved within a reasonable time, after he had virtually exhausted the first disbursement on

preparatory materials for the intended business, amounted to a breach of contract by the Defendant, as it made it impossible for him to implement his business plans.

Besides this, it was the Plaintiff's contention that the contract between him and the Defendant was an entire contract, and not a divisible one. It thus depended on the Defendant's complete performance of its obligations, if the Plaintiff was then to implement his business plans. Relying, among others, on the case of **Kusani vs Kulima Limited** [1981-83] 10 MLR 39, the Plaintiff argued that in the business venture he had planned, for the loan he sought to be of practical use to him, the Defendant needed to disburse it to him in full within a reasonable time. It was wrong, he contended, for the Defendant to, so to speak, parcel out this loan to him in bits and pieces, where to date the first installment disbursement has not been followed up by any other payment. He thus submitted that this delay and failure on the part of the Defendant to pay up the balance of the loan, completely destroyed the basis of the contract the two of them had entered into. *Vis-à-vis* the Defendant's complaint in the Pleadings to the effect that the Plaintiff did not mitigate his loss by, for instance, securing another loan from a different lending institution, the Plaintiff's view was that the Defendant cannot sustain this argument when it is the one that was holding the documents on the vehicle he would have needed to use as security in such other loan arrangement.

On the point whether it was in breach of contract as claimed by the Plaintiff, in its submissions the Defendant has, as good as, asked the Plaintiff not to cry over spilt milk. It has noted with interest the Plaintiff's persistence, on the strength of his word of mouth alone and without furnishing any written document on such, over the point that he had applied for a bigger loan than was granted in the case. Citing **Angelina Vito t/a Prean Computers vs First Factoring Company Limited** Civil Cause No. 826 of 2004 (unreported), the Defendant contended that it is the written Loan Agreement reflecting K51,000.00 as the full loan between the parties that has to hold sway in this case, and not the Plaintiff's clinging to what he orally claims ought to have been his loan. The Defendant then points out that Clause 1 of exhibit "P 4" permitted it to advance the K51,000.00 herein either in a lump sum or by installments, and that obeying this Clause it advanced its initial instalment on 7th may, 1998. The Defendant duly concedes that, but for the events that followed later, it had an obligation to release the balance of the loan amount to the Plaintiff.

On the said later events, the Defendant pointed out that although in terms of the agreement reached the Plaintiff was well aware that, *per* Clause 3 of exhibit "P 4," he had to start repaying the loan on 1st June, 1998, he deliberately ignored this obligation because, to him, he had to have the full K51,000.00 first. Referring to exhibit "D 2," the Client Reconciliation Account for the Plaintiff, the Defendant pointed out that indeed the Plaintiff only made one repayment in respect of this loan. This, according to the Defendant, was a default by the Plaintiff on the terms of the agreement he was bound by. The Defendant thus blamed the Plaintiff for quietly receiving the first disbursement without communicating whether or not it was adequate to start purchasing produce, and for thereafter quietly sitting at his home waiting for extra money, when he could have used the initial sum to buy tobacco produce. The Defendant in these submissions, even

blames the Plaintiff for neither going back to it to ask for more money or to ask for more time within which to make the initial repayment. The Plaintiff's failure to take these steps, according to the Defendant, is contrary to all reasonableness. It is this attitude, the Defendant claims, that has led the Plaintiff into accumulating arrears of repayments, which he could only attempt to explain away by saying that he was still waiting for the balance of the loan. It was thus the Defendant's contention that, contrary to the Plaintiff's allegation that it was the first to breach the agreement and to thereby prevent him from engaging in his intended business, it is the Plaintiff himself who first breached the agreement by failing to repay the first installment of the loan he got.

The Defendant next distinguishes the case of **Kusani**, cited by the Plaintiff, from the present case in that it related to a sale of agricultural equipment where assurance was given that delivery would be within 10 days, while the present agreement was on a loan the Defendant was at liberty to disburse in installments. Having disbursed the first sum, the Defendant argued that the sum in question was enough to start the business, and that the Plaintiff cannot therefore turn around and blame it after misusing that initial sum of money. The K23,715.00 disbursed, the Defendant insisted, was meant for produce and not for acquisition of tools for the business. This, it claims, was clearly agreed on by the parties, and adds that in any case acquisition of tools was supposed, as testified on by DW 1, to be done by borrowers with money from outside the loan. Apart from breach by way of not starting the repayments on the agreed date, the Defendant thus also argued that the Plaintiff's use of the installment advanced for purposes other than produce, was on its own a breach of Clause 4 of the Loan Agreement, and that his refusal or failure to furnish a detailed financial statement of his business, or to allow DW 1 full facility to inspect his business premises, was contrary to clause 6 of the Loan Agreement. The Defendant thus argued that on account of the Plaintiff's default in repaying the loan, it is the one that had a cause of action, both under the Loan Agreement and at Law, to recover the money it had disbursed to him. In this regard the Defendant relied on **Re Roberts** (1880) 14 Ch 49, where it indicated that a Creditor was allowed to sue his debtor on his failure to return the borrowed money on a stated date. Hence its counterclaim for K23,715.00 herein, with interest in thereon.

Looking at the totality of the evidence presented and at the submissions that have been made in the case, I should immediately observe that for the most part I found the evidence of Defence Witness Munthali somewhat academic. It is to be noted that by the time he was joining the Defendant Organization on 18th April, 1998, the Plaintiff's K51,000.00 loan had already been processed and approved, and that the first disbursement on the same was on the way in just under three weeks' time. Clearly, therefore, this witness did not play any role in the process leading to the acquisition of this loan or in the arrangements the parties came to on the same. I recall, though, that at some point Munthali claimed to have come across either the file for, or the application form for this loan, but I equally recall that he confessed that he could not remember its particular details. For all practical purposes, therefore, this witness' evidence on what happens, or on what is expected when a person obtains a loan from SEDOM, was general and not specific to this case. Indeed, I also noted that the witness further claimed that the rules of his organization required, for example, that borrowers find tools and materials for

their businesses with their own means and that, like in this case, the money loaned be specifically utilized for buying produce, but he did not exhibit even a single rule to back up this oral claim of his.

On the whole, therefore, I found the evidence of this witness to be of little value to the case at hand. However, I am and have throughout been mindful that, notwithstanding what I have just said, there still is a relevant portion to the evidence this witness gave. When, for instance, he testified of his personal dealings with the Plaintiff, between December, 1999 and July, 2000, I had to pay attention because that evidence was directly and personally amassed by him. If anything, therefore, it is that portion of evidence I should have due regard to and analyze as I determine the matter.

Turning to the Plaintiff, on his part, apart from appearing somewhat overexcited about his case, comparatively, I found him to be a much more impressive witness in the case. While I must say that I at the same time found his sense of loss, especially in his now no longer material special damages area, somewhat desperate and exaggerated, if not just erroneously calculated as he professed illiteracy and reliance on his school-going children in the exercise, the Plaintiff touched me as a man with a genuine grievance against the Defendant Organization. Notwithstanding the absence of the Loan Application Form he filled for me to note the details he entered thereon, it is my belief that in the dealings that took place between the parties in this matter the starting point should really be what loan was in the end offered to, and accepted by, the Plaintiff. To my mind, there is no doubt that the Loan Agreement entered into (exhibit "P 4"), as guaranteed (exhibit "D 3"), and as secured by a Bill of Sale (exhibit "D 1"), was neither for more than, nor for less than K51,000.00. Equally, as I see it, there is no dispute about the fact that out of this sum the Defendant only disbursed K23, 715.00 to the Plaintiff on or about 7th May, 1998, and that it has up to today disbursed nothing more.

Now, while it is correct that at Clause 1 of the Loan Agreement ("P 4") the Defendant had the liberty to either disburse this loan in one lump sum or in installments, and that the Agreement does not specify the period within which the full loan should be disbursed, I surmise that reason will demand that if the loan was meant for business purposes, full disbursement thereof ought to have been achieved within a reasonable time. In any event, considering that clause 3 of the same exhibit "P 4" required of the Plaintiff to start repaying the full K51,000.00 loan with interest as from 1st June, 1998, and to be through with all due repayments on that full loan within 10 months of so commencing the repayments, I find in this case that it would not in the least make sense to interpret the clause on disbursement of loan by installments as if it was so open-ended that the Plaintiff would be required to start repaying the loan in full even before him receiving the full loan. To me it would be nothing short of absurdity in the construction of the agreement the parties struck, to take it that the Plaintiff was under obligation to comply with this repayment schedule on a presumed full loan, when in fact what the Defendant disbursed to him amounted to less than half the sum agreed to be lent to him.

Besides this, I am of the mind that Mr Munthali, who was only two weeks old in the employ of the Defendant, and who was based in Nsanje at the time the Plaintiff was

getting his first and only disbursement of this loan in Blantyre, could not have been in any position to explain, or to justify why no other installment(s) followed after this. The Plaintiff's version, which I accept and believe, is to the effect that he was promised that he would get the said balance of loan after two weeks at the Defendant's Liwonde offices, and that despite numerous enquiries by him on this balance, both at the said Liwonde Offices and even at the Blantyre Offices, the Defendant never paid out the same. The said first disbursement having been paid out in early May, 1998, I apprehend that in promising the balance in two week's time, the Defendant meant to put the Plaintiff in full funds in regard to this loan within the very month of May, 1998 itself, before he could be expected to start his repayments as from 1st June, 1998. Payment of the balance of the loan to the Plaintiff any date before the date repayments were meant to start would in my view, had it taken place, have clearly amounted to disbursement of the full loan within a reasonable time. The fact that, in the Plaintiff's recollection he was promised this loan balance within two weeks of the first disbursement, simply confirms me in this view.

I hold, therefore, that in failing to disburse to the Plaintiff the full sum of money it had agreed to lend to him, and in subsequently, to date, making him endlessly wait for the remaining loan balance, while in the meantime pressurizing him to service the portion of loan disbursed, even though the repayment amounts he had to face were based on the full loan plus its interest, the Defendant unilaterally, and markedly, departed from the spirit of its agreement with the Plaintiff on the subject of this loan. In my judgment, therefore, it is the Defendant, and not the Plaintiff, that breached the Loan Agreement herein, by not fulfilling its side of the bargain, even after the Plaintiff had done all he was required to do to get the full K51,000.00 loan. Accordingly, the Plaintiff is entitled to general damages for breach of contract, in line with his pleadings,

The second question the parties addressed, I notice, is whether the Defendant's refusal to temporarily release the Plaintiff's Bluebook to him was a breach of contract as well as a tortuous act. On his part, the Plaintiff submits that his motor vehicle, to which the Bluebook in question related, having been pledged as security in this loan by way of a Bill of Sale (exhibit "D 1"), its Certificate of Fitness, as shown by exhibit "P 15," expired on or about 22nd March, 1999. He thus needed to be allowed access to this Bluebook, which the Defendant was keeping, if he was to have the vehicle serviced and tested for purposes of being certified fit, and being licensed to be on the road. The Defendant, he complained, did not at all attend to his requests, oral and his written (exhibit "P 14"), for the same. It was his argument that release of the Bluebook to him by the Defendant was, in the circumstances that were prevailing, a term to be implied in the contract between the parties. Quoting from **Reigate vs Union Manufacturing Company** (Ramsbottom) [1918] 1 KB 592, his view was that the implied term was *"...necessary in the business sense to give efficacy to the contract."*

On the same point, referring to Clause 4 of the Bill of Sale, i.e. on his (i.e. the Plaintiff's) obligation to keep the security in good and substantial repair and condition, and linking this Bill of Sale to the Loan Agreement, the Plaintiff argued that in the light of this obligation one could reasonably conclude that the Defendant would not unreasonably prevent him from so trying to have the motor vehicle in question kept in good and

substantial repair. He thus branded the Defendant's refusal herein to release the Bluebook after the expiry of the vehicle's Certificate of Fitness, a breach of an implied term in the agreement. Alternatively to this, the Plaintiff contended that the Defendant's refusal to release the Bluebook, which he claimed was an unjustified act, amounted to the tort of negligence. In support of this contention, he quoted from **Blyth vs Birmingham Water Works Company** [1856] 11 Exch 781 at 784 the words *"negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or [not]doing something which a prudent and reasonable man would not do."* On this basis, he argued that the Defendant's refusal to temporarily allow him the vehicle's Bluebook was such an unreasonable act, that it amounted to a breach of the duty of care that party owed him.

As against this, the Defendant first argued that the Plaintiff has not proved that his written request for the Bluebook, if he indeed so wrote one, was ever received by it. Besides, the Defendant submitted, it had no obligation to release the Bluebook. As a lender, it claimed, it had the discretion to disregard the security and to, instead, sue the Plaintiff on the loan. It added that it thus had no obligation either to seize the security or to demand payment from the guarantor. Its obligation to return the security to the Plaintiff, in the form of the motor vehicle documents it was holding, the Defendant claimed, was only going to arise once the Plaintiff repaid the debt he owed it. In support, it cited the case of **Ellis & Co's Trustee vs Dixon Johnson** [1925] AC 489, and quoted Viscount Cave LC at page 491 as having said *" I have always understood the rule in equity to be that, if a creditor holding security sues for his debt, he is under obligation on payment of the debt to hand over the security; and if, having improperly made away with the security, he is unable to return it to the debtor, he cannot have judgment for the debt."*

An observation the Defendant next made was to the effect that at the time the K23,715.00 loan portion was being paid to the Plaintiff in May, 1998, the Certificate of Fitness for the security herein was still valid up to March, 1999. In the event, the Defendant argued that the Plaintiff only has himself to blame if in all that period he could not use the vehicle to generate money to service his loan. As regards the period following after the expiry of the Certificate of Fitness herein, the Defendant maintained its claim that it did not receive any proper demand for the return of the Bluebook. It thus refused to be blamed for holding on to the same. Commenting on the Plaintiff's reliance on the **Reigate** case, the Defendant distinguished the authority as being based on principles governing contracts of employment. It wondered, therefore, how those principles could be applied in a matter of refusal to hand over a Bluebook in a Loan Agreement situation. *Vis-à-vis* the Plaintiff's claim that the Defendant was negligent in the manner defined in the **Blyth** case, the Defendant took the view that the claim in question is unsustainable, as negligence was not specifically pleaded. Accordingly, the Defendant denied having ever acted in breach of the Loan Agreement in question, as submitted by the Plaintiff.

Bearing in mind my earlier holding to the effect that in having failed to disburse the balance of the agreed loan to the Plaintiff on or before 1st June, 1998, when the said Plaintiff was expected to start repaying the full K51,000.00 loan, the Defendant was in breach of the Loan Agreement, it appears to me that the Plaintiff's further claim for

alleged breach of contract and/or commission of a tort through refusal to release the Bluebook for the motor vehicle used as security for the loan is superfluous and unattainable. The agreement having been breached by the Defendant right at disbursement stage, in that the said Defendant never gave the Plaintiff the full sum he was entitled to, it is my judgment that no obligation could have arisen on the Plaintiff's part to repay the loan in the amounts agreed, the same having been based on the full loan as long as the full loan was not in his hands yet. It is further my judgment, that the withholding of the loan balance having been done unilaterally by the Defendant, there was likewise no agreement, or alteration of agreement, to direct the Plaintiff to start repaying the loan on basis only of the portion of the loan he had been given, and so he was justified in not making any repayments until he could get the loan balance.

It follows, I believe, that as long as the Defendant remained in breach, by continuing to withhold the balance of the loan, it could not have lawfully and unilaterally required the Plaintiff to start making repayments to it on the insufficient loan, or to charge interest on the same. It will, in any case, be noted from exhibit "P 4" that, had the ideal happened, i.e. full disbursement of the agreed loan within May, 1998, and uninterrupted repayments as calculated flowing from then on for the next ten months as from 1st June, 1998, by March, 1999, when the Certificate of Fitness for the motor vehicle was expiring, the loan in question would have been repaid in full, without any balance being outstanding. In the premises, with the parties having so planned not only to have the loan fully disbursed, but also fully repaid with interest within a period of ten months ending with March, 1999, I do not see room in that agreement for an implied term for release of the Bluebook to the borrower after that period of time for the purposes the Plaintiff is asserting. Unless, therefore, the Plaintiff's position is that both parties anticipated non-compliance with their agreement up to the expiry of the Certificate of Fitness or beyond, which would be most strange, I do not accept argument that there was an implied term in this agreement meant to govern the parties' relations after the planned lifetime of their agreement. The loan not having been disbursed in full, and the obligation to start repaying not having thus arisen, I take it that even ten months down the line, when the vehicle's Certificate of Fitness expired, the obligation had still not yet arisen. The Plaintiff's further claim, therefore, in this matter for alleged breach of implied term of contract, or for tortuous liability through detention of the Bluebook is a figment of his imagination. In my judgment, it is unfounded and without merit, and so I dismiss it. In the result, the only liability I find genuinely attributable to the Defendant in this case is that arising from its breach of its contract with the Plaintiff by not disbursing the full loan to him, crippling in consequence his ambition to venture in the business he had planned to engage in.

In the light of my above views, it follows that I do not see any merit in the Defendant's Counterclaim. Having failed to provide the Plaintiff with the full loan it promised, and to do so in time for him to use the money and commence the repayments as agreed, the portion of loan it lent out could not, with or without interest, become due and payable, without the parties further agreeing to alter their original agreement by specifically catering for this eventuality. By the nature contracts take, with mutual consensus being in-built, the Defendant could not have had the monopoly to, at will, withhold part of the loan, as it did, on the agreement it struck with the Plaintiff. It equally had no mandate, in

the absence of an agreement to change the original position, to again at will, start demanding repayments on the inadequate loan from the Plaintiff before it (the Defendant) had fulfilled its part of the bargain. Likewise, the Defendant had no capacity, on its own and at will, to change the time when, or the event by which, the Plaintiff's obligation to start the repayments of the loan would be triggered into existence. In the absence of a mutual rearrangement between the two parties, therefore, as to the fate of the portion of loan that was disbursed, I see nothing in the evidence on record that would sustain the Defendant's claim that at some given point in time this K23,715.00 became due and payable to it. This said, however, it remains a fact that the said money was only lent, and that it was not given out and out as a gift to the Plaintiff. Since I have found that by not supplementing on it, as agreed, with the balance due the Defendant was in breach, this sum, less the single repayment of K2,800.00 the Plaintiff made on 3rd November, 1998, *per* exhibit "P 13," therefore remains in the hands of the Plaintiff as money had and received on a consideration that has since failed. The way I see it, there may only be a moral, rather than a legal obligation in this scenario, for the Plaintiff to repay this sum to the Defendant. I therefore dismiss the Counterclaim herein, with costs.

At this juncture it remains for me to decide, since special damages are no longer part of the case, what general damages the Plaintiff deserves to be awarded for the breach of contract I have held the Defendant liable on. It was the Plaintiff's submission in the case that, with reference to Cheshire, Fifoot & Furniture's **Law of Contract**, 13th edition at page 457, he as a party to an entire contract, and as one who performed only part of the work he undertook only because he was prevented from proceeding with his said work further by default of the Defendant, under the Law he ought not to be deprived of the fruits of his labour. In this regard what the plaintiff was driving at was that since it is by default of the Defendant that he did not have the full loan of K51,000.00 in this case, the Defendant should be compelled to pay for the fruits the K51,000.00 would have yielded for him had he applied it as he had projected, on purchase and resale of tobacco for a period of six months. In the way these arguments were framed, and on the authorities cited, which include **Hadley vs Baxendale** (1854) Exch 341, **The Heron II** (1969) 1 AC 350, and **Zimpita and Another vs Okoyo Garage** [1991] 14 MLR 532, it strikes me that the damages the Plaintiff was addressing are special damages. For reasons already given these arguments are beyond the limits of the case. I need, therefore, to check myself and remain within the bounds of valid pleadings. I thus remind myself of the need to only consider the general damages that are due to the Plaintiff in the circumstances of the breach he suffered.

Be this as it may, the point that a party who has been wronged in a contract is entitled to recover consequential loss is not wholly lost as consequential loss is not confined to special damages. *Per* Lord Justice Greer in **Hall vs Barclay** (1937) A.C. 620: *"In my judgment, it is an undoubted fact that there are two rules with which we begin in ascertaining how damage should be ascertained. The first is this: A Plaintiff who is suffering from a wrong committed by the Defendant is entitled, so far as money can do it, to be put in the same position as if he has not suffered that wrong. That is what is referred to as* ***restitution in integrum.****"at page 623.* It is my apprehension in this case that *restitutio in integrum*, in as far as general damages are concerned on breach of

contract, is represented by the sum of money which, regardless of what it may or may not have further yielded for him, would have enabled the Plaintiff to have his full loan. This is not all. *Restitutio in integrum* would in this case also include the sum of K2,800.00 the Plaintiff was forced to pay back to the Defendant before his obligation to repay the loan had arisen or matured. The shortfall in the disbursement of the loan the parties agreed on, therefore, after deduction of the K23,715.00 disbursed from an expected total of K51,000.00 comes to K27,285.00. If there is added to this sum the K2,800.00 the Defendant prematurely extracted from the Plaintiff, the total comes to K30,085.00. This, in my calculation, is what the Plaintiff needed, and what the Defendant deprived him of when it breached the agreement the two of them had entered into. I thus award this sum to the Plaintiff as general damages for breach of contract in the case.

Going to the particulars the Plaintiff pleaded in relation to the damage he claims he suffered, it is my observation that some of them can properly be compensated under the head general damages. As regards the claim he made for loss of use of the full loan, that is well taken care of by the award I have made for breach of contract. As for the claim for loss of business, that *per* **Manica (Malawi) Ltd vs Mrs Mbendera t/a PG Stationery** MSCA Civil Appeal No. 16 of 2002 and **H,H Chikaoneka t/a Madalitso Clothing vs INDEFUND Ltd** MSCA Civil Appeal No. 22 of 2001, would fall within the class of special damages, which have fallen out of the case. On loss of use of motor vehicle, linked as this is to the failed claim on detention of Bluebook, the Plaintiff is not entitled to any award on it. As for cost of transport, it is yet another detail of claim that has been affected by the dropping out of special damages. Finally on inconvenience, I am satisfied that for the anxiety he must have suffered over the loan, and for the pain of going through a futile loan exercise that has yielded no real benefit for him, the Plaintiff is entitled to compensation under the general damages head. I award him K50,000.00 for this inconvenience, excluding the inconvenience of expenditure on transport, accommodation, and the like, which would be in the category of special damages.

Considering, however, that despite the dismissal of the Counterclaim the property in the K23, 715.00 the Plaintiff got as part of the loan still remained and remains in the Defendant, I direct that payment of the general damages I have awarded to the Plaintiff in the sums K30,085.00 for breach of contract, and K50,000.00 for inconvenience, the Defendant, in paying the damages should withhold that sum. This therefore leaves the Defendant with a balance of K56, 370.00 to pay to the Plaintiff in full discharge of its liability in this case. Finally, and additionally, I award to the Plaintiff the costs of the action.

Pronounced in Open Court the 25th day of September, 2009 at Blantyre.

A.C. Chipeta
JUDGE