IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 237 OF 2012

BETWEEN:

SYDNEY CHIKHWAYA t/a SHERKS ENGINEERING

& WELDING CONTRACTORS PLAINTIFF

AND

UNITED GENERAL INSURANCE COMPANY LIMITED DEFENDANT

Coram: Justice M.A. Tembo,

Mwaungulu, Counsel for the Plaintiff

Masamba, Counsel for the Defendant

ORDER

This is this court's order on the defendant's appeal against the order of the Assistant Registrar made on 16th September 2013 by which summary judgment was entered in favour of the plaintiff for the sum of K6, 383, 592.81 being the cost of repairs made by the plaintiff to the order of the defendant, compound interest thereon, damages for breach of contract and costs of this action.

The appeal is brought pursuant to Rule 3 of the High Court (Exercise of Jurisdiction by the Registrar) Rules. The appeal is by way of a rehearing which entails that this Court makes a fresh consideration of all the materials that were before the Assistant Registrar. See *Gatrad and another v Sterling International Limited and another* [1990] 13 MLR 117.

The plaintiff filed an affidavit and skeleton arguments in support of his case and so too did the defendant file an affidavit and skeleton arguments in support of its case.

The plaintiff is a welding contractor and the defendant is an insurance company. The plaintiff had been previously engaged by the defendant to do some repair works on buses belonging to Axa Coach and Bus Company some of whose buses are insured by the defendant. The plaintiff's claim is for the sum of K6, 383, 591.91 being a debt arising out of repairs done to buses belonging to Axa Coach and Bus Company at the defendant's request. The plaintiff further claims compound interest at 1% above bank lending rate from the date payment fell due to the date of full payment. The plaintiff also claims costs of this action.

The case of the plaintiff is that the defendant has no bona fide defence to the claim hence summary judgment should be entered or alternatively that the defendant's defence does not disclose a reasonable defence and should therefore be struck out and judgment should be entered. The Assistant Registrar after hearing the plaintiff and the defendant entered summary judgment for the plaintiff on the ground that the defendant did not have a bona fide defence. The Assistant Registrar decided that consequently it was not necessary to consider the question whether the defendant's defence was a reasonable one.

The defendant appeals on three issues. This Court is therefore invited to consider three questions on this appeal, namely, Whether the Assistant Registrar erred in awarding damages for breach of contract? Whether this is a proper matter for summary judgment? Whether the defendant's defence discloses a reasonable defence?

This Court will first deal with the question whether the Assistant Registrar erred in awarding damages for breach of contract? The defendant submits that the pleadings between the parties do not show that the question of damages for breach of contract was an issue between the parties. The plaintiff does not dispute this

assertion. The plaintiff points out that the amended writ of summons does not contain the claim for damages for breach of contract originally included on the plaintiff's claim. A perusal of the amended statement of claim does not disclose the claim for damages for breach of contract. The defendant asks that the whole judgment ought to be set aside because of the inclusion of judgment for damages for breach of contract. The plaintiff argued that what ought to be done is to set aside only that part of the judgment that awards damages for breach of contract and not the whole judgment which would be unjust considering that those damages were awarded by mistake.

This Court agrees with the defendant and therefore sets aside that part of the Assistant Registrar's decision awarding damages for breach of contract as the same issue was not before the Court and might have been awarded by mistake.

The next question is whether this is a proper matter for summary judgment?

The plaintiff's case is that he has been in a business relationship with the defendant for a considerable period of time and was getting paid for work done on instructions of the defendant. The plaintiff submits further that in the course of this business relationship the defendant through its assessors and employees at divers times orally contracted the plaintiff to repair the damaged buses of Axa Coach and Bus the defendant's insured. The plaintiff invoiced the defendant for the repairs the subject matter of this action and the defendant refused to pay for the same arguing that its insured Axa Coach and Bus had not paid the relevant insurance premiums.

The defendant argues that the plaintiff relies on oral instructions allegedly given by the defendant to the plaintiff to repair the buses. The defendant asserts that all instructions to effect repairs were given in writing. Further that all invoices emanating from work done by the plaintiff following written instructions were paid for by the defendant. The defendant argues that such an issue is one that would necessitate trial of the issues and preclude summary judgment.

The defendant further argued that there is an issue of law involving privity of contract. That the whole arrangement was between Axa Coach and Bus Company and the defendant. The defendant asks that the plaintiff had to establish why he was suing the defendant directly when there is no agreement between the

defendant and the plaintiff and only an agreement between the defendant and Axa Coach and Bus Company.

Let me say that I have had difficulty to understand what the defendant means by saying that there was an issue of privity of contract. If the facts are that the defendant was engaging the plaintiff to repair buses of the defendant's insured there is no issue of privity of contract where the plaintiff is demanding payment from the defendant who gave instructions for repairs. However, this Court will first have to look at the law concerning summary judgment.

As rightly submitted by both parties summary judgment is entered where the plaintiff has clearly proved his claim and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. See *Lenner Exports (pty) Limited v City Motors Ltd* [1998] MLR 153 referring to *Robert v plant* [1895] 1 Q.B 597. See also *Anglo-Italian Bank v wells and Davis* (1878) 38 LT 197.

What is important is that on an application for summary judgment, first, the plaintiff must establish his claim clearly before the Court can consider whether the defendant has a bona fide defence or not or indeed if the defendant raises an issue that ought to go to trial. In the present matter this Court has to consider whether the plaintiff has established his claim clearly.

The plaintiff argues that he was orally contracted to do the repair works in issue. The defendant denies and disputes orally contracting the plaintiff and asserts that it only contracts the defendant in writing through written authorizations some of which are exhibited as IS 1, IS 2 and IS 4. In this scenario, the plaintiff has not submitted any written authorizations to clearly prove that he was contracted to do the work he submits he did on instructions of the defendant and the subject matter of this action. What the plaintiff has asserted is that it has a previous course of dealing with the defendant under which two invoices exhibited as SC 3 and SC 4 were paid for by the defendant and there were oral and no written authorizations for the same. The defendant has not produced the relevant written authorizations to rebut the assertion by the plaintiff with respect to exhibit SC 3 and SC 4.

The question therefore is whether in these circumstances the plaintiff has clearly proved his claim. There appears to be some work previously done where written

authorizations were made by the defendant before work was done by the plaintiff. There are other previous invoices for work done by the plaintiff and paid for by the defendant in respect of which there are no written authorizations but that cannot strictly speaking be proof that the defendant orally contracted the plaintiff on all the later invoices to do the work payment for which is the subject matter of this action. However, the defendant made payment after commencement of this trial for one of the invoices that it disputes and for which there is no written authorization. This is on invoice exhibited as SC 14 whose payment voucher is exhibit SC 18 and there is a corresponding bank deposit slip exhibit SC 19.

In these circumstances this Court finds that the plaintiff has clearly proved his claim given that the assertion by the defendant that it only authorizes the plaintiff in writing and not orally to do work for which the defendant pays appears untenable. The defendant claim is untenable because even after putting in a defence, that is examined below, the defendant went ahead and made a payment on an invoice emanating from oral instructions which the defendant is attempting to deny. There appears therefore to be a strong likelihood that the defendant indeed gave oral instructions as alleged otherwise the defendant would not be paying for an invoice emanating from oral instructions. Consequently, this is a proper case for summary judgment for the sum of K6, 383, 592.81 and the decision of the Assistant Registrar is accordingly upheld in that regard.

This Court now considers whether the defendant's defence discloses a reasonable defence or not?

The case of the plaintiff is that this court should strike out the defendant's defence on the basis that it does not disclose a reasonable defence. The plaintiff points out that the defendant denies in its defence transacting with the plaintiff but in the same defence states that it paid for all the alleged invoices on which the plaintiff is claiming and has no outstanding invoices owing. The plaintiff points out further that within this scheme of things the defendant went ahead and paid for one of the invoices in contention after this action was commenced by the plaintiff.

The plaintiff contends that if the defendant never transacted with the plaintiff it should have stated so and stopped at that. But that, to go further than that and state

that the defendant paid for all the invoices on transactions it denies is incredible. The plaintiff therefore asks for the striking out of the defendant's defence.

The defendant on the other hand argues that it has a reasonable defence which clearly shows that the defendant is disputing the plaintiff's claim. That the plaintiff could have just printed invoices on his computer and these have no accompanying written authorizations from the defendant.

The plaintiff has rightly pointed out that a reasonable defence is one with some chance of success when only the allegations in the defence are considered. See *Jackson v British Medical Association* [1970] WLR 688.

The plaintiff also rightly pointed out that where the defendant's denials are incompatible with each other it renders the defence suspect and the court can conclude that the defence is a merely aimed at causing delay and courts have gone further to strike out such defences. See *Dailesi v Mbewe and another* civil cause number 598 of 2010 (High Court) (unreported), *ADMARC V Prime Insurance Company Limited* civil cause number 17 of 2011 and *Smith v Prime Insurance Company Limited* civil cause number 2142 of 2009.

The plaintiff cited the case of *Apex Parts and Accessories v Mangulama Transport and Sales Ltd* [1993] 16 (1) MLR 4 in which a defence was struck out for not being a reasonable defence. In that case the plaintiff had issued and served on the defendant a writ of summons in which it claimed K42 710-73 in respect of goods sold and delivered to the defendant at the latter's instance and request. Shortly thereafter, the defendant paid K10 000-00 to the plaintiff in respect of this cause of action. The defendant then filed a defence which contained no more than a denial by the defendant that the goods in question had been sold and delivered to it. The plaintiff applied for an order striking out the defendant's defence and for judgment to be entered for the plaintiff. The Court held in granting the application to strike out the defendant's defence and allowing judgment for the plaintiff that: as no payment would have been made by the defendant if the goods had not been delivered, the defendant's defence was false, frivolous and an abuse of the court's process. And further that the defendant had no real defence and its purported defence had been a mere sham

This Court has looked at the defence of the defendant. The defence denies ever entering into repair transactions with the plaintiff herein. The plaintiff claims that he is not privy to the insurance contract between the defendant and Axa Coach and Buses whose buses the plaintiff repaired at the defendant's instructions. The defendant does not dispute that in its defence. It is rather surprising that at the hearing of this application the defendant now starts to raise the issue of privity of contract. As already indicated above there is no issue of privity of contract here. The defendant was contracting the plaintiff to do repairs period. The plaintiff does not know and is not party to the insurance agreement between the defendant and its insured. The defendant then also denies owing any of the amounts on the invoices as claimed by the plaintiff. Then the defendant adds that it paid all the alleged invoices and none is outstanding. Surprisingly, after commencement of this action the defendant paid on one of the invoices that it said was already paid for.

This state of affairs only confirms that the defendant simply put in a defence to delay the plaintiff's claim when in fact the defendant has no real defence. The defendant paid one of the invoices that it said it did not owe. There must be a reason why that is the case. Clearly, the defendant owes the plaintiff the sums claimed but is using the problems it has with its insured to keep the plaintiff out of his money for work that he already did at the instance of the defendant. Yet the plaintiff is not privy to the insurance contract between the defendant and its insured the Axa Bus.

In these circumstances, the defence is not a reasonable one and it is struck out. Why did the defendant pay for an invoice when they claim that invoice was not owing? The defendant's defence is merely aimed at causing dealy. Judgment would also be entered for the plaintiff for the sum represented by the unpaid invoice herein on account of the defendant's defence not being a reasonable one but one merely aimed at causing delay.

The last question is whether compound interest is due and payable on the invoices outstanding.

The defendant's case is that the Assistant Registrar erred in awarding compound interest at 1% above the bank lending rate. The defendant argues that the relationship between the defendant and Axa bus was one of indemnity and as such

an obligation can only attract interest when it is ascertained because it is at that time that a debt is created. In this case the defendant avers that the obligation to indemnify Axa has not arisen as such and therefore there is nothing to attract interest.

The plaintiff on the other hand argues that interest is payable in this matter. The plaintiff contends that section 11 (a) (v) of the Courts Act gives discretion to this Court to award interest in appropriate cases. That section provides as follows:

> Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have—
>
> (a) jurisdiction—
>
> (v) to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties or on sums found due and unpaid by receivers or other persons liable to account to the High Court.

That is indeed true as was echoed in the case of *Lenner Exports (pty) Limited v City Motors Ltd* [1998] MLR 153, 159 where the Court said

> In Malawi, section 11 of the Courts Act (Cap 3:01) of the Laws of Malawi, gives the court discretionary power to grant interest on a debt: *Gwembere v Malawi Railways Ltd* MSCA 9 ALR (M) 369 where the Honourable Skinner CJ held, that interest was not to be paid because the principle of payment of interest only applies where the party ordered to do so should have been shown to be wrongfully holding someone's money or owed someone money and was using it thereby putting the other out of his money.

This Court has already found above that there is no issue of indemnity in the dealings between the plaintiff and the defendant. This Court agrees with the plaintiff that the fact of the matter is that the defendant contracted the plaintiff to do some work for which the defendant has not paid. So, the argument about the relationship of indemnity between the defendant and Axa does not affect the plaintiff's claim for interest on outstanding charges for the work the plaintiff did on the defendant's request. The plaintiff is right that he was not privy to the insurance contract between Axa and the defendant.

In these circumstances where the defendant is owing a debt to the plaintiff arising out of work done by the latter on the former's instructions interest is payable. The

only question that remains to be determined is whether the interest has to be on simple as opposed to compound basis.

The defendant argues, in the alternative, that even if interest was awardable it ought to be on simple as opposed to compound basis. The defendant cited the case of *Adventist Health Services v Ustra Pharmacies* MSCA civil appeal number 20 of 2005 (unreported) in which the Supreme Court stated that when interest is awarded it has to be calculated on a simple and not compound basis. Unfortunately, the defendant did not supply a copy of this decision and this Court can not appreciate the reason for the holding ascribed to the Supreme Court. The plaintiff also cited the case of *S Mansukhlal and Co v Omar* [1992] 15 MLR 444 in which the case of *Wallersteiner v Moir (2)* [1975] 1 ALLER 849 was cited and where the Court stated the common practice of local courts was to award simple interest and that compound interest was awarded only as a punitive measure in certain circumstances. The defendant argued that there were no circumstances justifying compound interest in this matter.

The plaintiff on the other hand argues that interest ought to be on compound basis and has cited three cases in support of his contention. The first case is that of *The Registered Trustees of Tobacco Marketers Association v National Bank of Malawi* Commercial Case number 108 of 2009 in which the Court said

> In commercial matters the courts award interest at the commercial rate. This commercial rate is the rate at which the plaintiff would have had to borrow money in place of the money which had been wrongfully withheld from him by the defendant. This is usually the minimum lending rate as fixed by the central bank plus a mark up. It has come to be accepted that in Malawi the mark up is generally 4 %. In the United Kingdom the mark up is 1% *Tate & Lyle Food and Distribution Limited v Greater London Council and another* [1981] 3 ALLER 716.

The other cases cited by the plaintiff where interest was awarded at the prevailing bank lending rate for debt owing are *Inter Ocean Freight Services v AP Khoromana and another* civil cause number 259 of 1990 (High Court) (unreported) and *Kassam and another v Hardware and General Dealers Limited* civil cause number 2370 of 1994.

This Court has noted that although the Courts do not make it a practice to award compound interest, in commercial matters interest is awarded at the commercial

lending rate. This interest is imposed as a punitive measure on a defaulting defendant for keeping the plaintiff out of his money in a commercial relationship. Consequently, the interest herein is ordered to be paid on compound basis as that reflects the economic reality the plaintiff will face if he is to borrow money to invest whilst waiting for the defendant to pay up the debt which comprises the money the defendant has kept the plaintiff out of. The award of compound interest by the Assistant Registrar is therefore upheld.

In the foregoing premises the defendant's appeal therefore fails with costs to the plaintiff.

Made in chambers at Blantyre this November 2013.

M.A. Tembo

JUDGE