



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CASE NO 419 OF 2012

BETWEEN

CHIFUNDO TENTHANI CLAIMANT

AND

BLANTYRE WATER BOARD DEFENDANT

**CORAM: JUSTICE D.F. MWAUNGULU**

Kwakwalala, for the Plaintiff

Masumbu, for the Defendant

Mwanyongo, Official Court Interpreter

**Mwaungulu J**

## **JUDGMENT**

In this action Mr Tenthani, a customer and consumer, sues Blantyre Water Board, a utility provider, for trespass to land and defamation over what happened on 24 -25 September 2012. By the morning of 23 - 24 September 2012 Mr Tenthani was in arrears for the months of July and August 2012.

At 8:26 am on 24 September 2012, Mr Tenthani paid the arrears through a National Bank utility service for its customers. At 10:00 o'clock am Blantyre Water Board disconnected the water supply. They were unaware of the payment early that morning and the National Bank utility service system Mr. Tenthani used for payment. That day, he does not tell the time, Mr. Tenthani according to him, after the disconnection, went to inform of the payment and request reconnection. The Blantyre Water Board, unaware of the payment scheme Mr. Tenthani adopted, refused to recognise the payment and reconnect the water until Mr. Tenthani paid the arrears and the reconnection fee. Mr Tenthani, it appears, refused and never paid the reconnection fee. Parties did not settle the matter that day. It appears that there were further discussions the next day. Blantyre Water Board, however, reconnected the water at 6:00 o'clock pm on 25 September 2015.

Mr. Tenthani contends vehemently that Blantyre Water Board, who owed him a duty of care, breached that duty by, despite payment, refusing to connect the water for the two days. Mr. Tenthani suffered damage reasonably foreseeable for which he must recover from Blantyre Water Board. Mr. Tenthani further contends that the Blantyre Water Board's action, disconnecting the water of a diligent payer of its utilities, grossly dented his reputation among neighbours who in utter humiliation, think that Mr. Tenthani does not pay water bills. Mr Tenthani further contends that, having paid the water bills, Blantyre Water Board's entry on the premises was a trespass. The defendant contends that at the time of the disconnection and reconnection, Mr. Tenthani was in arrears from which Blantyre Water Board purported disconnect the water and, therefore, Blantyre Water Board was not negligent, never committed a trespass to land and never by its conduct, defamed Mr. Tenthani.

The two pleaded actions for defamation and trespass to land and one not pleaded action, surfacing prominently in the submissions and skeleton arguments,

depend on the finding of fact on the evidence both sides proffered in this court. It maybe that, due to that other remedies have been stated generally, that this court may have to consider whether other causes of actions, not clearly stated by the applicant's counsel, arise in this action. Maybe, starting with the one not pleaded but appearing in the skeleton arguments and submissions, namely, the claim for negligence, the short answer to the claim is that, it should fail on the one cardinal requirement that there cannot be an action for negligence where there is no injury to the claimant or damage the claimant's property (*Lynch v Knight* (1861) 9 HLC 577; *Dulieu White* [1981] 2 KB 669; *Blake v Midland Railway* (1852) 11 QB 93; *Juma v Mandala Motors Ltd* [1993] 16 (1) MLR 139; *Electricity Supply Commission of Malawi v Malawi Railways Ltd* [1987-89] 12 MLR 268; *Paul Gatrell Agencies v Yasini* [1993] 16 (1) MLR 416 ).There is negligence where another, from the nature of a transaction or relationship, said to owe a duty of care to another, by actions of omission or commission, breaches that duty of care and causes foreseeable damage to property of another or injury to the other which is not in the nature of de minimis. It is elementary that there must be damage caused by or following the other's breach of duty (*Tennet & Sons Ltd v Mawindo* [1981-83] 10 MLR 366; *Elias v Attorney General* [1973-74] ALR (Mal) 9; and *Donoghue v Stevenson* [1932] AC 562). The applicant never established that there was damage. It is unnecessary, therefore, to consider whether in this case the defendant owed the applicant a duty of care that, subsequently breached, caused injury to the applicant. As already noted, there is no action for negligence in the lodged statement of case. The action for negligence, only arising in the submissions, should, therefore, not be considered at all.

Trespass to land occurs when one through entry or any other manner interferes with land in possession, though not necessarily to ownership, of another. Unlike negligence, trespass to land is actionable per se and, therefore, the complainant does not have to prove damage. Trespass to land, therefore, is an action of strict liability. It must be established however that the entry or interference with possession of the land was without the consent or authority of the injured. The consent or authority can be explicit or implied. For a person on the premises of another with the consent or authority of another is a licensee and a licensee, until or unless the authority or consent is withdrawn or revoked, is not a

trespasser on continuing to be on the premises (*Thomas v Sawkins* [1935] 2 KB 249; *Tikafika Estates Ltd and another v Ashani* [1998] MLR 424.

Ordinarily, between a utility provider, such as the defendant is known to be, and a customer, the contract under which the public utility provider supplies utilities to a customer will be based on a contract which, as a matter of course, authorizes entry into the premises for interruption of supply of the utility when the customer either interferes with the facility or, as happened in this case, the customer fails to pay for the utility. In this case, unfortunately, neither the public utility provider nor the customer proffered the contract.

For Blantyre Water Board, the statute implies the license to enter premises (*Thomas v Sawkins*). Section 3 (1) of the Water Works Act creates a board for a designated water supply area:

There is hereby established for each water-area (in this Act otherwise referred to as the “water-area”) a Water Board (in this Act otherwise referred to as the “Board”) as specified in the Schedule.

Section 3 (3) of the Water Works Act empowers the board to enforce payments of rates and, at that, in accordance with the Water Works Act:

The powers of the Board shall include power to levy and enforce payment of rates in accordance with this Act, and power to engage in research or investigation in connexion with water supplies and water-borne sewerage sanitation either alone or by arrangement or in conjunction with other persons.

Section 15 (d) of the Water Works Act provides for specified times and power of entry and disconnection of water supply:

Any person duly authorized by the Board in writing may, any time between 6 a.m. and 6

p.m. or in the case of urgency at any other time, for the purposes hereinafter mentioned, enter into and upon any premises within the water-area through, over or under which any service or waterworks are laid ... to disconnect the supply of water to any premises or to diminish, withhold or suspend, stop, turn off or divert the supply of water to any premises.

According to both the Blantyre Water Board and Mr Tenthani, the Blantyre Water Board disconnected the water because of failure to pay for the water at Blantyre Water Board. There is, however, much ado about whether, at the time of disconnection by Blantyre Water Board Mr Tenthani had paid the bill. Mr Tenthani alleges and Blantyre Water Board denies that at the time Blantyre Water Board disconnected the water Mr Tenthani had paid for the water. The evidence, not controverted by the applicant is that on the 24<sup>th</sup> of September 2012 Mr. Tenthani had not paid for the months of July and August.

The first point taken by Mr. Tenthani is that he, having paid the whole bill, including the September 2012 bill, the Blantyre Water Board could not have disconnected the water supply. On Mr. Tenthani's own evidence, it is unknown and, therefore, should have been proved by him because the burden of proof lay on him, whether and when, having paid at 8:26 am, he made Blantyre Water Board aware of the payment. Blantyre Water Board is adamant that, however facile the system the National Bank created for the ease of its customers, it was not aware of it or part of it. Mr Tenthani has not shown that he informed Blantyre Water Board shortly or immediately after the payment through his bank. He subsequently, we do not know when and at what time, he went to Blantyre Water Board. Blantyre Water Board was adamant that it was unaware of the system to pay the bank. It reinforced the stance by calling a witness who in his witness statement stated that Blantyre Water Board was not aware of the scheme. Mr. Tenthani's witness statement does not say that Blantyre Water Board knew of the scheme. Mr Tenthani's counsel only raises the matter in the skeleton evidence. There is no evidence to back what Counsel raises. Whatever evidence there is on the matter, the question must be whether Mr Tenthani had, if at all, paid Blantyre Water Board

the arrears at the time of disconnection. Mr Tenthani assumes that payment at the bank of Blantyre Water Board through his bank was payment to Blantyre Water Board. That, in the absence of agreement that the bank would be the place of payment, cannot be correct.

In the absence of agreement to the contrary, it is the duty of the buyer to bring the purchase price to the seller. The seller, in the absence of agreement, is not supposed to seek the seller for the purchase price. Where, like here, the seller has a place of business, the buyer must pay the price at the seller's place of business. Mr Tenthani did not pay the arrears at the place of business of Blantyre Water Board. Paying at the bank of Blantyre Water Board is not paying at the place of business of Blantyre Water Board. Mr Tenthani's or Blantyre Water Board's banks are not places of business for Blantyre Water Board. Mr Tenthani has not proved any contract with Blantyre Water Board for him to pay at his bank or the Blantyre Water Board's Bank.

The plaintiff's counsel, without providing evidence for it, argues that Blantyre Water Board had advertised widely for the scheme. That, even if there was evidence for it, would not suffice as an agreement between the seller, Blantyre Water Board, and the buyer, Mr Tenthani to oust the general common law obligation for the buyer to pay, if not at the time of delivery, at the place of business of the seller, Blantyre Water Board. That should settle the matter, but, even assuming that payment could be made at the bank, the risk of paying at the bank, in the absence of an agreement, cannot be borne by the seller.

Where, like here, the buyer is in breach of the duty to pay the price, the law, in my judgment cannot be what it is assumed by Mr Tenthani to be, namely, that there is a presumption that there is payment as soon as a buyer pays the bank. This is because such a presumption cannot be made, even if the buyer pays in cash. If the payment is by cheque, the cheque may be referred to drawer or, where, there are different banks, inter banking implies that money may not be in the account on the date of deposit. The seller may then have to wait for cheque clearance. The latter problem could arise even where the payment is cash and monies have to be transferred between different banks. In either case, such a payment imposes a duty on the seller to check bank accounts every degree, every second, every minute, every hour, every day, every week, every month, every year! In the absence of

clear agreement, the common law is that the buyer, paying the price, must seek the seller at the seller's place of business.

Blantyre Water Board was, therefore, entitled all that time to insist that Mr Tenthani pay the water bills and, as long as Blantyre Water Board had no proof of payment, entitled to insist that they will not connect the water until they had proof of payment. It is unreasonable to expect that Blantyre Water Board when disconnecting the water at 10:00 o'clock am would have been aware of a payment made at a bank, not proven to be theirs, less than two hours earlier. Mr Tenthani was taking a risk to wait for over two months to pay the water bills.

I would have looked at the matter differently, probably if Mr. Tenthani, having not informed Blantyre Water Board about the payment, Mr Tenthani, nevertheless, proved that the bank account of Blantyre Water Board was immediately or during that day credited with the payment. Mr. Tenthani has not done so. Neither has Mr. Tenthani demonstrated that the payment facility with his bank was at the aegis of or consultation with Blantyre Water Board. It becomes therefore extremely difficult to think that, Mr. Tenthani being in arrears for the months of July and August, the Blantyre Water Board entered the premises as trespassers. Blantyre Water Board was entitled to enter the premises as long as there were still arrears on payment for the utilities and it was not aware of any payment by Mr. Tenthani.

So long as Blantyre Water Board was legitimately on the premises to enforce payment of arrears, the action for defamation must also fail. I have always understood it to be that where, through a representation, by conduct or a statement, there is a demeaning of one's reputation or esteem among fair and right thinking members of one's community by a publication to another, there is no defamation where it has been demonstrated that the defamatory statement was true (*Sims v Stretch* (1936) 52 TLR 671; *Phiri v Toyota Malawi Ltd* (2004) MLR 269. One, however, must establish that the representation, by a statement or conduct, was defamatory. Once a statement is defamatory, the wronged need not establish that the statement is false. Justification is a defence, not an offensive weapon. The law presumes in favour of the wronged that the representation is false and it is the wrongdoer who must show that it is true (*Belt v Laws* (1882) 51 LJQB 361; and *Katunga v Auction Holding Ltd* [2001] MLR 226. For, indeed, where the

misrepresentation, by a statement or conduct is, in fact, true, the presenter can argue, properly in my judgment, that there was no demeaning of one's reputation or esteem. There is, in such a case, a defence to the action, popularly styled justification.

In this particular case, as we have seen, Mr. Tenthani had not paid the July and August water bills. Blantyre Water Board, therefore, should have entered the premises to disconnect the water supply. May be disconnecting one's water supply, in appropriate circumstances, could be defamatory of one as indicating that one does not pay for water utilities. The only problem here, as I understand it, is that the representation was either the opposite, in which case it was not defamatory or, if defamatory, true. If there was anything, it was that the July and September 2012 water bills had not been paid and that is why Blantyre Water Board was on the premises. I would therefore, not think that Blantyre Water Board is liable for defamation.

As I indicated earlier, the claims for inconvenience, albeit grotesquely stated, could be understood as claims for nuisance. Even here, an action would not lie because there is no nuisance, the wrong properly understood, for a person to be on the premises of another, however and whatever the convenience, for an otherwise legitimate cause.

I would therefore dismiss the action by Mr. Tenthani against Blantyre Water Board with costs to Blantyre Water Board.

Made this 27<sup>th</sup> day of November 2015

**D.F. Mwaungulu**

**JUDGE**