



**IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NO. 485 OF 2021
(Before Honourable Justice Manda)**

BETWEEN

RSC LIMITED.....CLAIMANT

AND

MOTA ENGIL ENGENHARIA E. CONSTRUCAO AFRICA SA.....DEFENDANT

Coram: E. M. Zidule : Assistant Registrar
N. Misanjo : Counsel for the Claimant
Z. Nkowane : Counsel for the Defendant
B. Ntonya : Court Clerk

RULING ON ASSESSMENT OF INTEREST

Background

The parties entered into a series of contracts from or around May, 2020 whereby the Claimant sold to the Defendant steel construction materials. Pursuant to the agreement between the parties, the Claimant used to supply the materials to the Defendant under two accounts, namely, credit account and cash on delivery account. The Defendant was required, on the credit account, to pay for the materials within 90 days of the invoice while on the Cash on Delivery (COD) account, the Defendant was required to pay upon delivery of the materials. The Defendant had an outstanding sum of MK522, 464,441.82 on credit account and the sum of MK127, 409,730.20 on COD account as at 31st October, 2021. The Claimant commenced proceedings against the Defendant after the latter failed to pay

despite the Claimant sending several reminders and requests for the money. The Claimant claimed the sum of MK649, 874,172.02 being the principal sum on the outstanding invoices, compound interest at 1% above National Bank of Malawi Plc's lending rate, the sum of MK19, 626,225.16 being collection costs on the principal sum, the sum of MK3, 238,327.15 being surtax on the collection costs, collection costs on interest and costs of action. The Defendant filed a defence and denied liability on all the claims made by the Claimant.

By an agreed order dated 9th March, 2022, judgment was entered in favour of the Claimant for the sum of MK322, 464,441.82 payable in 3 equal monthly instalments beginning end February, 2022 while the rest of the claims including the claim for interest and collection costs were to be adjudicated upon by the Court. A further order was made by the Court on 7th February, 2023 awarding the Claimant compound interest on the principal sum and the sum of MK19, 926,225.16 as collection costs on the principal sum.

Evidence

PW1 was Mr. Arvindkumar Rajani, Managing Director for the Claimant Company. He adopted his witness statement and tendered exhibits attached to his witness statement as part of his evidence in this matter. In cross examination, PW1 stated that he is involved in procurement discussions and that he was involved in the negotiations between the parties herein. It was also PW1's testimony that he had a final say on the negotiations between the parties pertaining to price and the mode of payment. However, PW1 denied Defendant's allegation that the Claimant agreed to forfeit interest on the unpaid invoices. PW1 also denied ever having discussions with the Defendant on the possibility of forfeiting or waiving interest.

PW2 was Mr. Manoj Sanjeeva Sanjaram who works for the Claimant as a Financial Controller. In his evidence he stated that he filed three witness statements, namely, witness statement filed on 6th March, 2023, supplementary witness statement filed on 21st April, 2023 and further supplementary witness statement filed on 17th May, 2023. According to PW2, he filed a supplementary witness statement because he used the rate of 20% in the interest computations exhibited to his witness statement filed on 6th March, 2023 (initial witness statement) instead of using the rate of 18.3%. Further, PW1 stated

that he attached exhibits "MS 1 to MS 5(c)" to his initial witness statement, "MS 6 (a) to MS 6 (c) to his supplementary witness statement while exhibits "MS 7" to "MS 15 A 40(a)" were attached to his further supplementary witness statement. PW2 adopted the three witness statements and the exhibits attached thereto as part of his evidence. In cross examination, PW2 stated that he used both simple and compound methods of computing interest. For instance, PW2 stated that he used compound method when he was computing interest in the initial witness statement, simple interest at the rate of 18.3% when he was computing interest in the supplementary witness statement while both compound and simple interest was used when he was calculating interest in his further supplementary witness statement. It was also PW2's testimony that in his further supplementary witness statement, interest was calculated at the rate of 21% since National Bank of Malawi Plc had revised interest rates on 14th May, 2023. In re-examination, PW2 stated that even though the Court directed that interest should be compounded, the Claimant is comfortable to proceed with calculations based on simple interest.

The sole witness for the Defendant was Mr. Marco Ribeiro Oliveira who works in the Defendant's Finance Department. He started by making corrections to the heading of his witness statement and stated that it was a typing error since he is not Ricardo Almeida. DW1 adopted his witness statement and stated that he exhibited interest calculations, to the statement, based on invoices raised from May, 2020 to June, 2021. He also confirmed that he conceded interest on COD invoices. In cross examination, DW1 stated that the amount payable to the Claimant as interest amounts to MK61,832,632.29. He also confirmed that the amount he found to be payable as interest does not include the conceded amount on COD invoices. Further, DW1 confirmed that he used same invoices, dates and amounts as those used by PW2 in his calculations. However, DW1 stated that the number of delayed days for making payments used in his calculations is less than the number of delayed days used by the Claimant. According to DW1, he used June, 2021 as a cut off point for calculating interest. However, DW1 stated that if it turns out that the cut-off point is wrong then his calculations will also be wrong. DW1 also stated that he will not have a reason for reducing the days if the cut-off point is not June, 2021.

Responding to a question on waiving interest, DW1 admitted that he did not adduce any evidence to prove that the Claimant waived interest. He also admitted that he did not mention the people who were involved in the discussions to waive interest as well as the date when the said discussion was had. Further, DW1 admitted that he did not take into account the dates that the Defendant paid the principal sum in instalments in his calculations. In re-examination, DW1 stated that he did not have the agreement for waiver of interest since he had not joined the Defendant Company by the time the agreement was being made. DW1 concluded by stating that he used reference rates obtained from National Bank of Malawi Plc and calculated interest on a monthly basis.

Issues for determination

- i. Was there a waiver for payment of interest?
- ii. What is the cut-off point for calculating interest in the matter herein?
- iii. What is the appropriate quantum to be awarded as interest in the matter herein?

Analysis

Was there a waiver for payment of interest?

It is trite that the burden of proof in civil matters lies on the party that alleges. In the case of **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, wherein the Court stated as follows;

"Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v National Trust Co [1927] A C 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the

law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties - see Bond Air Services Ltd v Hill [1955] 2 QB 417".

In the matter herein, the Defendant alleged that the Claimant waived interest on credit invoices prior to the parties' agreement to switch to trading on COD basis. The Claimant, through PW1, denied Defendant's allegation that the Claimant agreed to forfeit interest on the unpaid credit invoices. The Claimant also denied ever having discussions with the Defendant on the possibility of forfeiting or waiving interest. The burden of proof is therefore incumbent upon the Defendant to prove that there was a waiver of interest since the Claimant denies the allegation. However, when DW1 was asked in re-examination if he had any document pertaining to the said waiver, he stated that he did not have the agreement nor any document for waiver of interest since he had not joined the Defendant Company by the time the agreement was being made. Considering that the Defendant failed to adduce any evidence to prove the allegation and DW1's testimony that he did not have the agreement nor any document pertaining to the agreement for a waiver, the court finds that the Defendant has failed to prove the existence of a waiver on interest between the parties.

Cut-off point for calculating interest in the matter herein

There is an issue pertaining to payment of interest up to the date when the Defendant made the final payment towards settlement of the principal sum. According to the Claimant, interest is payable up to the date when the principal sum was fully paid on or around 29th April, 2022. The Claimant also submitted that its interest calculations reflect and include interest accruing in between the instalments as per exhibits "MS 6 (a) and MS 6 (c)". However, the Defendant argued that the Claimant cannot be awarded interest for days in between instalment payments since by mutual consent the parties had agreed to service the debt by instalments and that the Claimant did not claim for such interest in the assessment bundle or by way of amendment. Even though the Claimant prayed for compound interest from the dates of the invoices to the date of full payment, the agreed orders executed by the parties on 9th March, 2022 and 7th February, 2023, respectively,

do not provide for the period for calculating interest. Further, there is nothing on record to show that the parties agreed on the cut-off point for computing interest. Bearing in mind that proceedings for assessment of interest are based on a judgment or an order disposing of the matter, the issue pertaining to cut-off point for calculating interest was to be resolved when judgment was being entered. Considering that the Orders were entered/made by the Honourable Judge, the issue pertaining to cut-off point for calculating interest can only be properly determined by the Honourable Judge seized of this matter. The court has therefore exercised its powers under Order 25 rule 2 of the CPR, 2017 to refer the issue to the Honourable Judge seized of this matter to make a determination on the period for calculating interest.

Appropriate quantum to be awarded as interest to the Claimant

This will only be determined after an order on the cut-off point for calculating interest has been delivered by the Honourable Judge.

Conclusion

Having considered that the Honourable Judge has to make a determination on the cut-off period for calculating interest, an order on assessment of interest shall be delivered after the determination aforementioned.

Any aggrieved party is at liberty to apply for review or appeal against the decision of this Court within 14 days from the date hereof.

Delivered in Chambers this 1st day of August, 2023 at the High Court, Commercial

Division, Blantyre



E.M. Zidule

Assistant Registrar