

**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**BLANTYRE REGISTRY**

**Commercial Cause No. 399 of 2020**

**BETWEEN**

MULLI BROTHERS LIMITED.....CLAIMANT

**AND**

ECOBANK MALAWI LIMITED.....DEFENDANT

Coram: **Manda, J**

Gondwe for the Claimant

Chikabvumbwa for the Defendant

M. Kachimanga Court Clerk/Interpreter

**RULING**

This was the defendant's application to discharge an interlocutory injunction which was granted by Justice Dr. Mtambo on the 31<sup>st</sup> of December 2020. The injunction was granted restraining the defendant bank from selling or advertising for sale, trespassing and/or interfering with the claimant's peaceful enjoyment of a property known as Chitakale Estate, located at Njuli area

within the District of Chiradzulu. The application was that the injunction was to subsist up to the hearing and determination of the matter or till a further order of the court. The claimant has opposed the application.

This being a matter that was not initially before me, I must state that I did have a bit of a struggle to try and make heads or tails of what were the issues in this matter. Having perused the matter a number of times, I began to get a bit of understanding as to what was going on. The main issue being that the claimant is indebted to the defendant bank under a number of loans and that it defaulted on those loans. The claimant having defaulted on those loans, the defendant proceeded to recall on those loans. One of the loans recalled was secured by Chitakale Estate which the defendant advertised for sale in order to recover their money. The application for an injunction was against that particular sale.

It was the assertion of the claimant, that the defendant could not sell the Estate on account that after the claimant fell into arrears, the parties went into an arrangement. The arrangement that was reached (according to the statement of case), was apparently that the debt was going to be recovered by "a 10% deduction, assignment of proceeds from the Government of Malawi". It is not clear from the statement of case from where the 10% deduction was going to come from or what was exactly meant by that. This is what partly caused my confusion. What was clear though is that this action was brought on the basis of the alleged assignment of proceeds agreement that the parties had entered into. In this regard, there was a suggestion by the claimant that the defendant was breaching that particular agreement when it advertised to sale Chitakale Estate.

According to the claimant, they agreed with the defendant proceeds amounting to MK746, 126, 802. 42 which were part of a settlement due to the claimant from the Government of Malawi would be remitted to the defendant. Further that while they were waiting for the payment from government and due to uncertainty of government payments, the claimant would make a bullet payment of MK48, 000, 000. 00. The claimant then went on to exhibit a "Without Prejudice" letter dated 22<sup>nd</sup> July, 2020, which outlined the above ("CKB1"). The letter does not mention of the MK48 Million though. It just mentions of a cheque being enclosed and the cheque that was enclosed was for the MK48 Million and exhibited as "CKB3". It was the claimant's assertion that this was the "agreement" between the parties and that the defendant did acknowledge the same by signing it.



On the 11<sup>th</sup> of August, 2020, the defendant responded to the claimant by stating that they were rejecting the proposal that the claimant made in the letter of 22<sup>nd</sup> July, 2020. Among the grounds for rejecting the proposal were the uncertainty as to when government was going to pay the claimant, that the claimant had not adhered to previous agreements with the bank and that the debt had been outstanding since 2011. In view of this, the defendant stated that it would resume the sale of Chitakale Estate. So contrary to the claimant's assertion, there was no agreement since clearly there was no acceptance.

On the 18<sup>th</sup> of September, 2020, the claimant's Managing Director wrote back to the defendant bank and perhaps for easy of reference, let me reproduce that letter. The letter read as follows:

Reference is made to your letter dated 31<sup>st</sup> of August, 2020, addressed to Messrs. Ritz Attorneys-at-Law and our previous meeting with you on Thursday, 23<sup>rd</sup> July, 2020 regarding the above.

Kindly be reminded that during the said meeting we requested the Bank to be issuing bid bonds and reference letters to assist us bid for contracts and that proceeds from the said contracts would be assigned to the Bank. Again we hoped that this would enable us to pay down the facility as we continue to wait for the Government payment on our legal action and the same was agreed upon.

Take note your Management cannot reject the arrangement that was agreed in our previous meeting between yourself, Joseph Khonje and myself as you can refer attached letter signed by yourself, Cheque payment of MK48 million Malawi Kwacha and Bank Statement.

Find our response to the points raised in your letter:

- a. The proceeds were not diverted but rather the Bank held our payment because of the loans that we had with them
- b. Mulli Brothers Limited willingly paid MK48 Million without being asked by the Bank in order to be provided with bankable services but Ecobank has not implemented this to date
- c. Mulli Brother Limited willingly assigned proceeds to the Bank without being forced and again a deduction of 10% on each payment transaction is functional

- d. You are still not issuing bid bonds and reference letters to assist us bid for contracts despite making a bullet payment of MK 48 Million and 10% recoveries on every payment transaction

However, we are surprised to learn through your letter that your Management rejected our proposal to settle this matter amicably as proposed in our previous meeting. We strongly believe that the issue of selling the property is a non-starter because we are fulfilling our obligation by paying the bank accordingly hence our interest to see that the debt is settled and not to sell the property in question as indicated in your letter.

We trust that by agreeing to the above and working together, we will assist each other to liquidate this outstanding debt hence both parties will benefit from this mutual agreement and understanding.

It is our hope that you will consider the above very seriously and resort to working together in order to resolve this matter amicably rather than complicating it by resuming the sale of the property in order to secure the debt

Trusting the above is in order and please be guided accordingly

Yours faithfully

Leston Mulli

Managing Director

From the record, the defendant did not apparently respond to the claimant's letter which forced the claimant to come to court and obtain an injunction. When Granting the injunction, Justice Dr. Mtambo (rtd), indicated on the order of the injunction that the same would "expire in 14 days if written evidence of the assignment of proceeds from government not produced". On the 8<sup>th</sup> of January, 2021, the claimant filed what they deemed to be a sworn statement in compliance with the Order of injunction. Attached to the sworn statement was a Consent Order on compromise settlement between Ecobank and Mulli Bothers Limited and Leston Mulli. This Consent Order was made under Commercial Case Number 116 of 2017.

Beside the Consent Order, the claimant also attached a letter from Churchill & Norris authorizing the Attorney General to deduct the sum of MK750, 000, 000, from a settlement which was



apparently going to be made under Civil Cause No. 474 of 2012 involving *Sunrise Pharmaceuticals Limited and Chombe Foods Limited v The Attorney General*. Further to this, there is also a letter from the Attorney General to the Secretary to Treasury on the same Civil suit. In that letter, then the Attorney General noted that there was a Release Agreement with the lawyers of the two claimants. That by that release Agreement, the government was to pay the sum of MK3, 048, 557, 708. 71 to the two companies (as assessed by the High Court) but with further loss of business to be assessed or agreed by the parties.

Further still, the Attorney General went on to state that he had received a claim from the lawyers for the sum of MK12, 002, 959, 710 .96 being total interest, damages for loss of business and damages for loss of use and that the total due was MK14, 562, 493, 698. 74. According to the letter, the Attorney General sent the Secretary to Treasury the documents with the calculations with the request that the amounts be subjected to an Audit. Following which the government was to advise if it was willing to settle at the claimed amounts or to negotiate lower sums. It was further stated that whatever agreement with the claimants was to be in full and final settlement of all claims and to be reduced in writing. Finally, the Secretary to Treasury was to revert to the Attorney General with instructions on the proposed settlement and also indicate if government would pay Ecobank directly.

It is not clear from the file what happened after this process and whether following the Attorney General's letter to the Secretary to Treasury, it can be stated that there was an assignment from government. Suffice it to say that on the 2<sup>nd</sup> of February, 2021, the defendant filed a defence and a counterclaim to the claimant's action. In turn the claimant filed his defence to the counterclaim, and the matter proceeded for Mediation which was terminated and the matter was set down for scheduling conference. However, before the matter could be set down for trial, this application was filed.

The basis of this application is that the injunction should be discharged on the ground that there was non-compliance with the order of the Court. The stated order of the court is the one which I quoted above and the same stated that the order of injunction was going to **expire** [emphasis mine] in 14 days if the claimant did not provide proof of assignment of proceeds from government. As also stated, on the 8<sup>th</sup> of January, 2021, the claimant filed what they designated as a sworn statement in compliance. From my calculations, this sworn statement was filed within the 14 days

that Justice Dr. Mtambo stipulated. At that time, the Judge was still seized of the matter and if the defendant felt that there was non-compliance, why did they not go back to the Judge at that time and file this application? The order clearly had a time limit which the defendant did not use. If the defendant truly believes that there was non-compliance, then they should have pointed out the same to the Judge and the injunction would have stood expired. The defendant clearly sat on its rights so I must find this application to be out of time and clearly a waste of the court's time. The application to discharge the injunction is thus misconceived and is dismissed.

Looking at this matter as a whole, I also must make note that there seems to be no clear direction. The matter is supposed to be set down for trial but the question is what are the triable issues? The claimant clearly does not deny owing the defendant money. All the claimant asserted was that the parties had an agreement that the claimant would assign proceeds from government to pay the defendant what was due. I believe it is not up to this court to make a determination of the form the assignment should have taken as we did not grant the injunction. However, what we can assume is that the Court seized of the matter at that time was satisfied with the sworn statement that was filed on the 8<sup>th</sup> of January, 2021. In this regard, and by extension, it can only be concluded that the court was satisfied that there was proof of assignment of the proceeds from the government.

Having made the determination that there was proof of assignment, there is of course question as to what would have been the Court's next direction? This we cannot speculate. We can only make assumptions. The first most logical assumption we can make is that the injunction did not expire and that it is still standing as, seemingly, the basis on which it was granted was satisfied. The claimant having filed what was purported to be a sworn statement in compliance. The second logical assumption we can make is based on the standing principles on which injunctions are granted, namely that when granting an injunction, the court must be satisfied that there is a triable issue. In the context of the facts of this matter, that triable issue can only be that it was opined by the Judge then, that it was probable that the parties had an agreement that the claimant would pay the claimant the sum of MK48 Million and assign 10% of each transaction paid to the bank, whilst waiting for payment from the Malawi Government. This is in fact what the claimant has been asserting.

From the defendant's arguments, they state that the documents which the claimant filed are not deeds of assignments. They go on to state that in fact the claimant has been refusing to execute the



deed of assignment which was to be executed by the 31<sup>st</sup> of December, 2017. The claimant states that this was per a Compromise Settlement Agreement which they exhibited as "CTG1". For all intents and purposes, "CTG1" is an Order of the Court which was made under Commercial Case Number 116 of 2017, the matter was before Justice Dr. Mtambo. If the claimant was refusing to comply with this order, surely the defendant (as a claimant in that matter) should have enforced that particular order! There is no explanation as to why this was not done and I find that to be quite baffling!

The injunction that was granted by Justice Dr. Mtambo **clearly** did not set aside "CTG1". Further, when the defendant bank became aware of the order of injunction they should have promptly brought this application before Justice Dr. Mtambo, pointing out to him what was happening. After all it is a cardinal principle of law that a Court would not come to the aid of someone who does not respect its orders and I am sure that if the defendant had presented its case to Justice Dr. Mtambo promptly, the outcome may have been different. But here we are.

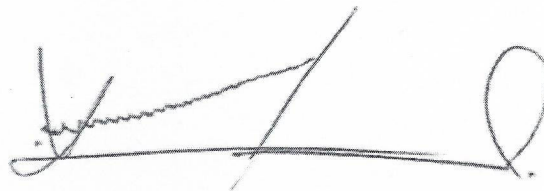
I would also add that the fact that there is already a standing Court Order on the very same facts, would make these proceedings an abuse of court process. Surely the defendant and its lawyers would be aware of this. Being so aware, it defies reason and logic as to why the defendant did not immediately moved to have these proceedings dismissed! Further, having filed an application to discharge the injunction on the 25<sup>th</sup> of May, 2021, and the same having been issued on the 21<sup>st</sup> of July, 2021, and set down for the 24<sup>th</sup> of October, 2021, before Justice Alide, the defendant never prosecuted it! Rather the matter went for mediation which was terminated and then came to me for trial. Something which I must state that I also did find illogical! I would have thought that the application to discharge the injunction, being earlier in time, would have been prosecuted first.

As noted already, the issues being raised here were already dealt with under a consent order ("CG1"). Under that order, it is my considered view that the issues which this matter now raises were already dealt with. As for the application to discharge the injunction, it not having been prosecuted in 2021, the same should be deemed to have been abandoned. I do not think that as courts we should be tolerating such levels of incompetence from counsel! Considering the amount of money involved, I do find such tardiness to be unacceptable. In view of this, the defendant cannot be arguing that they have been unfairly treated. One cannot sit on their laurels and then assert injustice! As for the issue of the claimant suppressing material facts in that he got a payment

of MK3 Billion but never cleared his debts with the defendant, the same would also be a violation of the terms of the Consent Order and if that was the case then the defendant should have enforced the Order.

I do realize that I may have gone off tangent, when I have already made my decision with regards the application that was before me. However, I felt that what I have said needed to be said, especially if this case is going to go forward, which I am very doubtful about, in view of "CG1". As for the application to discharge the injunction, I do dismiss the same, I will however make no order as to costs. Looking at this matter I believe that each party should bear their own costs.

Made in Chambers this.....8<sup>th</sup> ..... day of.....December.....2023

A handwritten signature in black ink, appearing to be 'K.T. Manda', with a large loop at the end.

K.T. MANDA

**JUDGE**