IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 266 of 2022

BETWEEN

YANKHO KAIMILA.....CLAIMANT

AND

DAVID BANDAWE..... DEFENDANT

Coram: **Manda, J**

Jere for the Claimants

Bandawe (In person)

M. Kachimanga Court Clerk/Interpreter

RULING

This was the claimant's application for a hearing for disposal of the matter on preliminary issues of fact and law. The defendant opposed the application.

The facts of this case are simple. On the 20th of January, 2018 the defendant borrowed the sum of K10, 000, 000.00 (Ten Million kwacha) from the claimant. The loan was for a period of four and a half months (from 16/1/2018 to 31/5/2018) and it was to attract 15% interest per month. The defendant, who is a lawyer by profession drafted the agreement between the parties and executed it.

In his defense, the defendant denied that he requested the claimant to lend him K10, 000, 000. Rather it was the defendant's contention that it is the claimant who offered to help the defendant's daughter who was in a relationship with the claimant's brother. According to the defendant, it was the claimant's brother who asked him to draw up the agreement and that throughout the discussions he was not involved and that he has never met the claimant.

The defendant then went on to allege that the claimant told his daughter not to worry about the money as the claimant wanted to help the Bandawe family. Further that the claimant only became furious and started demanding her money back only after the relationship between the claimant's brother and his daughter ended. Further still, it was the defendant's assertion that he was surprised that the claimant was demanding the money back apparently "because at one time Kumbukani Kaimila (the Claimant's brother and apparently had orchestrated the transaction), called the defendant and told him that he had sourced funds and paid off the claimant, and that the claimant was fully aware of this". In view of this the Defendant sought to plead estoppel.

It was also the defendant's assertion that this was not a commercial transaction but rather that the claimant was assisting her brother's lover. The defendant thus argued that it was a suppression of material facts to assert that this was a commercial transaction. It was also the defendant's assertion that it is illegal for the claimant to charge interest and assert that she has incurred loss of profits or that the loan now stands at MK89, 500, 000, because the claimant does not a license of a financial lending institution within the meaning if the Financial Services Act. The defendant further asserted that the conduct of the claimant of charging 15% interest per month is not only illegal but also harsh and unconscionable in terms of the Loan Recoveries Act.

From the foregoing, it was the defendant's submission that he has a good and arguable defence and that this matter cannot be disposed on a preliminary issue of fact and law. In this regard, it was the defendant's submission that his defence addressed three implied terms of the contract. First the express term that MK10 000 000 would be disbursed and that he was not disputing that. Secondly, the defendant stated that there was an express term of the contract that repayment would be effected after 4 months through and agent of the plaintiff Kumbukani Kaimila. Thirdly, the defendant argued that the contract did not specify how payment would be made and that it was not a sham to state that payment was made through the claimant's agent. The defendant then went on to talk about the parole evidence rule which I really did not find relevant to this matter. Though apparently the defendant wanted to say that the defence proves that the money was repaid by Kumbukani. To say the least, this argument was misconceived.

The defendant also argued that there was an implied term of the contract that the contract would be legal and that this contract was not enforceable as the claimant did not have micro-lending

license as per section 21 of the Financial Services Act. The defendant argued that loan shark lending or katapila is illegal and thus not enforceable.

The question that we have before us is whether this matter can be disposed of on a preliminary point of fact and law? By extension, we will have to also answer the question as to whether the defendant has a good and arguable defence.

In terms of the law, Order 16 r. 6 (1) provides as follows:

> *6.—(1) The Court may hear arguments by the parties in a proceeding on preliminary issues of fact or law between the parties where it appears likely that, if the issues are resolved, the proceeding or part of the proceeding will be resolved without a trial, or the costs of the proceeding or the issues in dispute are likely to be substantially reduced.*

From the facts before me, it is quite clear that there is a contract between the parties. It is not in dispute that the defendant, who is a lawyer, drafted the contract. The defendant also conceded to the fact that the contract had an express term that the sum of MK10, 000, 000 would be given to him and that he would repay the same after 4 months. I must state that the loan clearly identifies the claimant as the lender and the defendant as the borrower. Further, contrary to the defendant's assertions, there is no implied term in the contract on in any addendum that the loan would be repaid by the claimant's alleged agent, Kumbukani Kaimila. In any case if the loan was repaid then the same would not be implied under the terms of contract but rather would have to be proved and demonstrated through evidence. The defendant has not offered any evidence of repayment.

In terms of assertions of illegality, unconscionableness or harshness, the defendant having drafted the contract in this instance, clearly showed an intention to be bound by the terms of the agreement. (see ***Merrit v Merrit*** [1970] 2 All ER 760 and ***Simpkins v Pays*** [1955] 3 All ER 10) In fact being a lawyer, the defendant has to be assumed to have had a stronger bargaining power than the claimant, as such he cannot be allowed to renegade on the contract. In this regard it must be stated that the principle "freedom of contract" gives parties a right to bind themselves in any they see fit without interference form the Courts or the government (see ***Printing and Numerical Registering Co v Sampson*** (1875) 19 Eq 462 and ***George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*** [1983] QB 284).

As for section 21 of the Financial Services Act, the same only provides for grounds of deregistration. The section does not provide for what the defendant is asserting. Further in

terms of harshness and unconscionableness, being a someone who has been at the bar for a considerable time and having drafted the agreement between the parties, the defendant knew exactly what he was agreeing to, so again he cannot argue that the agreement was harsh on unconscionable. On this note I would agree with the observations of the Supreme Court of Ghana in ***Attitsogbe v CFC Construction (Wa) Ltd & Read*** 2005/ 2006 SCGLR 858 where the Court stated as follows:

> *"Under the equitable doctrine of unconscionable bargain, the courts would set aside as unconscionable, any dealing whether by contract or by gift where on the account of the special disability of one of the parties, that party had been placed at a serious disadvantage in relation to the other. The categories of special disability which should not be regarded as close would include poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation was necessary. All these circumstances could in the right context, justify the court's intervention on the basis of the equitable principles embodied in the doctrine of unconscionable bargain."*

Further useful observations regarding unconscionable bargains were made by Lord Denning in ***Lloyds Bank v Bundy*** [1974] 3 AER 757 where he stated as follows:

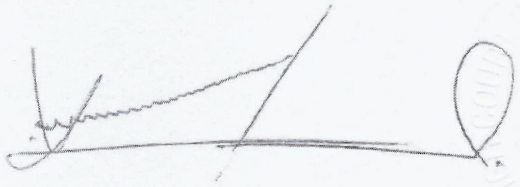
> *"Gathering all together, I would suggest that through all these instances, there runs a single thread. They rest on inequality of bargaining power. By virtue of it, the English law gives relief to one who without independent advice enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word ''undue'', I do not mean to suggest that the principle depends on proof of any wrongdoing. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal."*

Looking at the facts of this case, the defendant cannot claim special disability or that his bargaining power was grievously impaired. Otherwise, the defendant would be deemed impecunious and thus not fit to practice law. Otherwise what we have here is a defendant who

want to run away from a bargain which he freely entered into. This can be demonstrated from the fact that in one breath the defendant is arguing that he repaid the loan and then he turns around and says the contract is not enforceable because it is illegal. Then the defendant states that it was his son in law who orchestrated the contract in one breath (and yet the contract is in his name!) and then he states that the claimant was simply trying to assist his daughter and his family! Quite obviously the defendant was being economical with the truth.

Now it being clear that there is a clear and binding contract between the parties and that the defendant clearly does not have any arguable defence on fact and law, I do not see any reason as to why this matter should be prolonged any further. I will thus enter judgment for the claimant for the sum of MK10, 000, 000 being the contract sum and I would also award the claimant the costs of the action. Since the agreement is clear that the loan was going to attract interest at 15% per month, I will refer the matter to the Assistant Registrar to assess the interest accrued thus far.

Made in Chambers this.....6th .....day of .....February.....2024



K.T. MANDA

JUDGE