IN THE SUPREME COURT OF APPEAL

SITTING AT Lilongwe

MSCA CIVIL APPEAL NO. 94 OF 2018

[Being High Court, Commercial Division [Lilongwe Registry], Commercial Case Number 302 of 2017]

BETWEEN

STANDARD BANK OF MALAWI	**APPELLANT**
AND	
MAONE OIL MILLS LTD	**1ST RESPONDENT**
OMEGA INVESTMENTS LTD	**2ND RESPONDENT**
CONSOLIDATED TEXTILES[MLW] LTD	**3RD RESPONDENT**
ABDUL KADER PATEL	**4TH RESPONDENT**
ZARINA MAHOMED FAROOK	**5TH RESPONDENT**
MAHOMED FAIZAL PATEL	**6TH RESPONDENT**

CORAM: **THE HON. THE CHIEF JUSTICE A K C NYIRENDA SC JA**
HON. JUSTICE L P CHIKOPA SC JA
HON. JUSTICE F E KAPANDA SC JA
HON. JUSTICE H POTANI JA
HON. JUSTICE J KATSALA JA
HON. JUSTICE I C KAMANGA JA
HON. JUSTICE M C C MKANDAWIRE

Likongwe, P.[Mr.]/Masanjala[Mr.] of Counsel for The Appellant
Mpaka, P.[Mr.] Of Counsel for The Respondents
Shaibu[W], Senior Judicial Research Officer
Msimuko[Mrs.]/Chiusiwa[Mrs.] Court Reporters
Chimtande[Mrs.]/Masiyano[Ms.], Court Clerks

RULING/ORDER

This matter's sojourn in this court so far has been a bumpy one. Accordingly, the ruling we are making available today relates to three matters dealt with by this court on May 12, 2021 and July 27, 2021. To do that in an effective fashion we think it proper that we bring this ruling with its full factual context.

The parties appeared before the court below on a matter regarding the appellant's desire to realize their security in relation to financial accommodations extended by the appellant to Cotton Ginners Africa Ltd. The total sum in issue was MK10,497,062,000.00 plus interest. According to the appellant the sum arose out of guarantees and indemnities which the respondents had executed in favour of the appellant in relation to the above referred to loans advanced by the appellant to the respondent.

Apart from the guarantees and indemnities the appellant executed surety charges on various properties belonging to the 1st, 2nd and 3rd respondents namely Nkolokoti 78, Bwaila 4/353 and Mapanga 97 in favour of the appellant to secure the loans advanced to Cotton Ginners Africa Ltd. The appellant also sought to sell the above properties in their attempt to recover the money advanced to Cotton Ginners Africa Ltd.

In the court below the respondents contested the guarantees/indemnities. They generally denied their validity claiming that they had expired by effluxion of time. The 1st, 2nd and 3rd respondents specifically counter-claimed for a rectification of the land registry by discharging the surety charges registered in the appellant's favour.

On December 14, 2017 the respondents obtained an *ex parte* interlocutory injunction restraining the appellant from selling the charged properties. The *inter parties* hearing was set down for February 6, 2018.

On February 2, 2018 the appellant was served with an application for summary judgment and/or a disposal of the case on a point of law returnable on February 6,

2018 on the same date and time scheduled for the *inter parties* hearing for the injunction referred to above.

The appellant contested the application and drew the court's attention to procedural improprieties in the application for summary judgment. The foregoing notwithstanding the court below delivered its judgment on August 9, 2018 holding that the guarantees/indemnities were *voidable*. It proceeded to dismiss the appellant's claim and on October 30, 2021 ordered a rectification of the land registry to remove the charges granted by the 1st, 2nd and 3rd respondents to the appellant.

The appellant has now appealed to this court seeking a reversal of the summary judgment. It has filed a total of 24 grounds of appeal.

When the appeal was called for hearing on May 12, 2021 it turned out that the respondents had not fully complied with the trial protocols in this court. Specifically, they had not filed skeleton arguments, a list of authorities and the authorities themselves. In a bid to rectify the problem the respondents asked this court to allow them an extension to do the needful and to thereafter adjourn the matter so that this court and the appellant can have an opportunity to fully acquaint themselves with the new documentation. In the alternative, they asked that we allow them to address the court without having to file written arguments, a list of authorities or the authorities themselves.

The appellants objected to such prayers and urged us to deny the respondent audience in this court.

We dismissed the application for an extension of time with costs. We promised to make available the reasons therefor subsequently. Herewith the same.

The law and practice of this Court is clear enough. Parties seeking audience before it must adhere not only to substantive laws engaged but also its rules of procedures. There should, in other words, be adherence not only to substantive justice but also procedural justice. And where a party does not adhere to one or the other appropriate sanctions will be applied. Such sanctions include the denial of audience to the offending party. That is obvious from Practice Direction Number

1 of 2010, this Court's decision in **Chipeta v Banda & FDH Bank** MSCA Civil Appeal Number 27 of 2020[unreported] and also the dissenting opinion of Hon Katsala JA in **Ngwira & Another v Ngwira** MSCA Civil Appeal Number 16 of 2020[unreported] which has now, as matters turn out, been adopted as the official position of this court on issues to do with procedural justice.

Where however a party seeks to be pardoned for non-adherence and spared sanctions it behoves them to show cause why they should be so forgiven. This invariably involves the offending party showing, on a balance of probabilities, that the noncompliance was in the circumstances for good cause and further that there will be no injustice thereby caused to the innocent party that cannot be cured by an award of costs and more importantly that it is in the interests of justice that the offending party be allowed to further participate in the case the procedural transgression[s] notwithstanding.

Applying the above to the instant case the facts show that the respondents were served with the appellant's arguments on September 17, 2019. They were also served with a notice of hearing on April 13, 2021. For a hearing slated for May 12, 2021. They never, in response to such services, filed their own arguments, list of authorities indeed the authorities themselves. They instead on the last Friday preceding May 12, 2021 served the appellant and this court with an application seeking an extension of time within which to comply with the procedural protocols. Their reason for such tardiness? Their Counsel was busy. We do not want to read such reason as suggesting that the rest of us were not as busy. Suffice it to say that one wonders what it is that kept Counsel so busy it trumped the need for him to prepare for an appearance before Malawi's apex court.

Whichever way one looks at the application and the arguments advanced in its favour it is obvious that the reasons [if that is what they amount to] are simply not good enough to excuse the respondents' failure to comply with the procedural protocols necessary for an audience in this court. And the reasons having been found wanting the questions whether allowing the respondents audience in the appeal would not cause undue injustice to the appellant or be in the interests of justice are an unnecessary aside.

The application for an extension having been dismissed the respondents were denied audience in the appeal. We only heard the appellants. Much like we did in **Chipeta v Banda & FDH Bank** to a party that similarly offended the rules of procedure. We reserved our ruling.

We also heard, on July 27, 2021, an application from the respondents. In the main it alleged that the appellant had effectively smuggled on to the record of the appeal two grounds, namely grounds number 23 and 24 which did not appear in the original notice of appeal dated August 9, 2018. The respondents asked that we expunge from the record the said grounds of appeal 23 and 24, that in the alternative we recall the appeal for rehearing on the new grounds of appeal and lastly that we give any other order or direction that we may, in the circumstances deem just and appropriate.

We dismissed the application. The respondents were clearly being disingenuous. If not disrespectful. More than that we think that a request for '*any other order or direction that the Court shall deem just and appropriate in the circumstances of the present case*' equals a rather careless use of language. It gives the impression that the respondents are fishing. Coming into this Court nor entirely sure about what they want but believing that the court would, in its magnanimity, grant them some order notwithstanding that they had not specified what kind order they were looking for and the reasons why it should be granted. It is a form of advocacy that parties must desist from. Parties should at all times state very clearly what it is they want from the court and the reasons for such request. At the very least it allows both the court and other litigants to sufficiently identify and thereafter address the issues before the court.

Coming to the appeal against the summary judgment/judgment on admissions this court has before considered the circumstances in which the same should be granted. The two most immediate cases are those of **Standard Bank Ltd v Tourism Investments Ltd & Euro Industries Ltd** MSCA Civil Appeal Number 17 of 2018[unreported]and that of **Illovo Sugar Plc v Ecobank Malawi Ltd** MSCA Civil Appeal Number 4 of 2020[unreported].

In both cases this court was most emphatic that summary judgment/judgment on admissions should only be granted when there is, on the pleadings and facts, clearly no defence to a claim. Where it is clear that the defendant is seeking to do no more than waste time and delay the inevitable. In the words of the **Standard Bank Ltd v Tourism Investments Ltd & Euro Industries** case:

> *'when faced with an application for summary judgment and/or judgment on admissions, there are a number of factors that the court needs to look at before it can enter judgment. ..... firstly, it has to satisfy itself that indeed the defendant has no defence to the plaintiff's claim or part thereof except as to the amount of damages claimed. Secondly the defendant has not raised an issue, a question or dispute which ought to be investigated through a trial. Thirdly, that there is no reason warranting a trial in respect of the claim or part thereof. Fourthly, the admission founding the application for judgment on admission must be unequivocal'.*

Asking ourselves the question whether such is the case herein the answer can only be in the negative. There are in this matter various questions of fact and law to be answered. Were, for instance, the guarantees for a specific sum[s]? Have such sums been repaid? Had the guarantees expired by the time the demand for the repayment of the sum in dispute herein was made? All these in our view are questions/issues that are incapable of resolution without trial. We therefore agree with the appellant that this was not a proper case in which a summary judgment/judgment on admission should have been entered. Accordingly, the same is hereby reversed. Instead, the matter is sent back to the court below where it will proceed to conclusion in a manner by the law provided.

Without in any way detracting from the above sentiments we feel obliged to say something about grounds of appeal 7, 23 and 24. Not because they were the subject of the application from the respondents disposed of on July 27, 2021 but because of our views about them in the course of hearing the appeal herein. The long and short of it is that they were struck off. Ground number 7 because it does not state whether it is on a point of law or fact. In that regard it falls afoul of the guidelines set out in **Prof. Mutharika & Electoral Commission v Dr. Chilima & Dr. Chakwera** MSCA Constitutional Case Number 1 of 2020[unreported] and

Dzinyemba t/a Tirza Enterprises v Total[Mlw]Ltd MSCA Civil Appeal Number 6 of 2013[unreported] regarding the manner in which grounds of appeal should be crafted.

Grounds 23 and 24 on the other hand are expunged because they are not valid grounds of appeal. They are not part of the notice of appeal filed on August 9, 2018. The appellant should have sought and been granted leave of court to include them in the notice of appeal mentioned above. No leave having been sought and none granted the grounds are accordingly expunged.

Costs shall be to the appellants in all applications.

Dated at Lilongwe this 27th day of February, 2024

HON A K C NYIRENDA SC

CHIEF JUSTICE

HON L P CHIKOPA SC

JUSTICE OF APPEAL

HON F E KAPANDA SC

JUSTICE OF APPEAL

HON H POTANI

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