



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 169 OF 2012**

**BETWEEN**

**MALAWI BUREAU OF STANDARDS ..... PLAINTIFF**

**AND**

**H.H. WHOLESALERS LIMITED ..... DEFENDANT**

**CORAM: HON. JUSTICE R. MBVUNDULA**

Chayekha, Counsel for the Plaintiff

Defendant unrepresented

Chimang'anga, Official Interpreter

**JUDGMENT**

By its amended pleadings the plaintiff claims the amount of K 3 069 154.90 said to be the balance on several invoices issued by it to the defendant, which invoices are said to be outstanding as the defendant has neglected to settle them. In its amended defence the defendant asserts that it paid to the plaintiff all the money that was due to it and has no outstanding balance. In the alternative the defendant pleads that some of the invoices referred to are statute barred.

The plaintiff called three witnesses whilst the defendant called none. The defendant had no representation at the hearing despite counsel being served with the relevant notices of hearing and could and did not, in consequence, cross-examine the plaintiff's witnesses.

It is, I think, necessary, at the outset, to state the legal position that not only must a party plead facts to be relied on by that party at the trial, but also to lead evidence to

prove its case, failing which the case must fail. This applies herein as against the defendant in that, for lack of evidence, the defendant's assertion that it paid all the money that was due cannot stand. Nevertheless this finding does not absolve the plaintiff of the burden required in civil claims to establish one's claim on a balance of probabilities. The plaintiff's evidence will therefore be analysed in order to establish whether that burden has been discharged. If not, the plaintiff's claim should be dismissed.

As earlier stated, the plaintiff's evidence came from three witnesses who were not cross-examined.

PW1 was an Accounts Assistant of the plaintiff and responsible for issuing invoices. The relevance of her evidence was in regard to the process taken on issuing invoices, the reproduction of which is not necessary here.

PW2 was the plaintiff's Quality Assurance Technician much of whose evidence was also in relation to the procedure followed in arriving at the invoicing stage. He also stated that he was involved in the process of invoicing the defendant and that the defendant had outstanding invoices. He did not quantify the invoices.

PW3 was the plaintiff's Credit Controller whose duties, he said, included following up on outstanding invoices raised either at the plaintiff's head office or at border posts, and ensuring that CESS not charged at the border posts is charged. It was his evidence that in liaison with the Malawi Revenue Authority the plaintiff was able to establish the amount of CESS due from importers which amounts would be notified to those concerned. With regards to the defendant, so went PW3's evidence, sometimes their goods would pass through border posts without a charge being made either by omission or on prior arrangements with some clearing agents allowing for later payment, and that it is in this connection that the defendant accumulated outstanding invoices. PW3 further stated that in the event of errors the defendant would raise queries but as regards the invoices now claimed the defendant never did, yet no payment has been made.

PW3, in apparent admission that some of the invoices could be statute barred, as pleaded by the defendant, said it may be noted that some invoices "dated way back",

but went on to explain that the reason was that every time the defendant was asked about them they would accept liability and promise to settle them in due course, the point here, as I gather from plaintiff's final submissions, being that the defendant cannot rely on the statute of limitation on account of its acknowledgment of the debt time and again. PW3 concluded that at the material time the defendant's total outstanding bill was K3 069 154.94.

I will first consider the plaintiff's position on limitation on account of the defendant's alleged acknowledgment of the debt from time to time. The cases of *Manica Freight Services v Chitundu* 11 MLR 225 and *Mrs Edness Kantumbiza v National Bank of Malawi Limited* Civil Cause No. 455 Of 2015 were relied upon in this regard. I have not accessed *Kantumbiza v National Bank of Malawi Limited* but *Manica Freight Services v Chitundu* does stand for the principle that time starts to run anew whenever the plaintiff's claim is acknowledged by the defendant. Taking into account the plaintiff's uncontroverted evidence alone, in that regard, the defendant's claim that some part of the claim is statute barred would not stand. There is, however, another consideration at play, and it is to do with pleading on the part of the plaintiff.

When the present suit was instituted the relevant rules of procedure were the Rules of the Supreme Court. Under Order 18 rule 13 (1) and (2) it is provided:

13. – (1) Any allegation of fact made by a party in his pleadings is deemed to be admitted by the opposing party unless it is traversed by that party in his pleadings or a joinder of issue under rule 14 operates as a denial of it.

(2) A traverse may be made either as a denial or by a statement of non-admission and either expressly or by necessary implication.

The case of *Byrd v Nunn* (1877) 5 Ch.D. is authority for the position that under the rule the implied admission under the rule has the same value and effect as if there was an express admission. In view of this legal position, the plaintiff, not having traversed the defendant's pleading on limitation, by way of the defence of the alleged acknowledgment of debt, is deemed to have expressly admitted the defendant's allegation that part of the claim is statute barred. It is accordingly the court's finding that part of the plaintiff's claim is indeed statute barred. In this regard all that part of

the claim not arising within the six year period provided for under section 4 (1) of the Limitation Act are to be excluded from the claim.

Having said that little else remains to be said. In my analysis of the plaintiff's evidence, and taking into account that the defendant's relevant pleading as regards the money claimed is just a general traverse, and the fact that there is no contrary evidence to that of the plaintiff is before this court that the plaintiff issued invoices some of which remain unsettled, I am satisfied that some of the plaintiff's invoices so remain outstanding and due from the defendant, and order that the defendant do settle the same. The plaintiff would, however, have to specifically prove the same on assessment before the Registrar to the exclusion of those caught by the Limitation Act.

In its amended statement of claim the plaintiff sought to be awarded the following, in addition to the principal:

- a) compound interest at the bank rate plus 3%;
- b) collection charges as prescribed; and
- c) costs of the action.

An order is hereby made granting the same, subject to assessment, where applicable.

Delivered at Blantyre this 9<sup>th</sup> day of August 2022.

  
R. Mbvundula  
**JUDGE**