



Republic of Malawi
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 144 OF 2023
(Before Msungama, J.)

BETWEEN:
WATERFALLS INTERNATIONAL HOLDINGS LIMITEDCLAIMANT
AND
GREVAR CHIKOLA T/A CHIKOLA INVESTMENTS.....DEFENDANT

Coram:

Msungama, J.

Mwala, Counsel for the Claimant

Gondwe, Counsel for the Defendant

Ntonya, Court Clerk

RULING

1. This ruling is on an application by the Defendant for order of summary judgment on his counterclaim against the Claimant. Therefore, the only issue for the determination of the court is whether a summary judgment should be entered in favour of the Defendant on his counterclaim against the Claimant.
2. By its statement of case, the Claimant, a limited liability company, has brought an action against the Defendant claiming damages for causing breach of contract between it and Seedco Limited and for breach of an implied term as to title of fertiliser sold to it by the Defendant which was on-sold to Seedco. The Claimant also seeks a declaration of this court to the effect that the Defendant is not entitled to claim payment from it in respect of fertiliser delivered to it as long as it has not been paid by Seedco. The Claimant states that it entered into a contract with Seedco for the supply of 1,200 tons of fertiliser. Upon entering into this contract, the Claimant asserts, it approached, among others, the Defendant and agreed with him to supply to it the fertiliser for on sale to Seedco to satisfy the Seedco contract. Pursuant to this agreement, it is further asserted, the Defendant supplied the Claimant fertiliser worth MK166,656,000. The Claimant states that although it was an implied term of the contract that the Defendant had good title to the fertiliser, it turned out that the fertiliser which it got from the Defendant had been stolen from a third party. The Claimant asserts that after Seedco

learnt of the theft, it proceeded to cancel the contract and advised the Claimant not to supply any more fertiliser. The cancellation of the contract in relation to the unsupplied part of the originally agreed quantity, the Claimant asserts, occasioned loss to it as a consequent of which it claims the damages outlined above.

3. The Defendant denies the claim and states that both its acquisition and procurement of the fertiliser and its subsequent sale to the Claimant were done in good faith. The Defendant further asserts in his defence that the cancellation of the contract between the Claimant and Seedco had nothing to do with him and further denies being in breach of his obligations in terms of title to the fertiliser that he supplied to the Claimant. It is, therefore his contention that there is no excuse for the Claimant to withhold payment of the price of the supplied fertiliser. As a result, he counterclaims the sum of MK166,656,000 being the price of the fertiliser supplied to the Claimant. The Defendant also claims interest and, legal collection charges and also party and party costs. It is also worth mentioning that the Defendant further asserts in the defence that the Claimant actually gave him postdated cheques as payment for the fertiliser but these cheques were all dishonoured by the Claimant's bankers.
4. In its defence to the counterclaim, the Claimant denies that the Defendant is entitled to any payment in respect of the fertiliser supplied as it was stolen. The Claimant further asserts that the cheques which were given to the Defendant were post-dated and it was understood between the parties that they would only be presented after the Claimant was paid by Seedco. The Claimant asserts that, in fact, the cheques were presented by the Claimant after the problems relating to the supplied fertiliser had arisen and the Claimant had obtained an injunction to restrain him from harassing the Claimant's officials in respect of the payment for the fertiliser. The Claimant, therefore, denies being liable to the Defendant for the fertiliser supplied.
5. The application for summary judgment by the Defendant on his counterclaim is supported by a sworn statement by his counsel. In that sworn statement, Counsel depones that the Claimant's Managing Director ("MD") was arrested by the police following investigations involving stolen fertiliser. It is further deponed that upon being quizzed by the police in the said investigation, the said MD, Mr Joy Chinthenga, told the police that some of the fertiliser worth MK35,000,000 had been sold to Seedco and that Seedco had yet to pay for it. However, when the police tried to ascertain this fact with Seedco, it was found that in fact Seedco had paid for all the fertiliser which was supplied them by the Claimant and there were no outstanding payments from them. It is, therefore, contended that the Claimant has no defence to the counterclaim.
6. The other sworn statement which was filed in support of the application for summary judgment was sworn by the Defendant himself. In it, the Defendant states that Seedco in fact already paid the Claimant for all the fertiliser supplied by the Claimant to it. He has attached a copy of an email message from Seedco as GC1 in which Seedco states that it paid the Claimant for all the fertiliser that was supplied by the Claimant to it.
7. The application for summary judgment on the counterclaim is opposed by the Claimant. The said opposition is supported by a sworn statement sworn by Mr. Chinthenga. In it, he states that his company entered into a contract with Seedco to supply them with

fertilisers worth MK1.5 billion. A copy of the contract has been attached to his sworn statement as JCC1. He has also attached a copy of a local purchase order in the same amount issued to his company by Seedco. Having won this contract, the Claimant entered into several contracts with various suppliers to supply it with the fertilisers for it to satisfy the Seedco contract. In this respect, the Defendant supplied it with fertilisers worth MK166,656,000. It later turned out that the fertiliser was stolen from a third party. The Defendant was actually arrested by the police. The deponent attached a copy of the bail bond in respect of the bail granted to the Defendant by the police as JCC4. After his arrest, the Defendant led the police to Seedco as he told them that some of the stolen fertiliser had been sold to Seedco. Because of this incident, Seedco cancelled the contract with the Claimant. At the date of cancellation, fertilisers worth MK854,448,500 had not yet been supplied to Seedco thereby occasioning loss on the Claimant in terms of the profit he would have made.

Law

8. Summary judgment is dealt with under O.12 r.23 to r.27 of CPR 2017. The relevant parts for the purposes of this matter are r.25 and r.27. O.12 r.25 (2) which states as follows:

“Where the court is satisfied that –

- a) The defendant has no arguable defence to the claim or part of the claim as presented in the application; and
- b) There is no need for a trial of the application or part of the application, the court shall-
 - i) give judgment for the applicant for the application or part of the application; and
 - ii) Make any order the court may deem appropriate.

O.12 r.26 states as follows:

“The court shall not enter summary judgment against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law.”

9. In applications for summary judgment, the overall burden of proof rests upon the applicant to establish that there are grounds for his belief that the other party has no real prospect of success¹. On the other hand, the hurdle to be jumped by the other party is a modest one. The reason why the other party's hurdle is a modest one is that giving a judgment in favour of the applicant has the effect of depriving the other party his fundamental right to be heard. So only when the court is convinced that even if he is given the right to be heard, he will still be unable to defend himself, then, and only then, should he be denied his right to a trial².
10. The summary procedure provided under the above provisions is designed for quick disposal of straight forward cases without resorting to trial and is only available where the applicant demonstrates that the other party has no arguable defence to the claim or part of the claim and has no real prospect of defending the claim. Therefore, the

¹ **ED&F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472

² **Codd v Delap** [1905] 92 L.T. 510

procedure is designed to cater for situations where the court does not need to draw any assistance from pre-trial procedures provided under the rules such as scheduling conference³, pre-trial conference⁴, disclosure of documents⁵, and without the benefit of trial procedures such as examination of witnesses. The court's duty is to decide whether the other party's prospect of successfully establishing the facts relied upon by him is "real", that is more than "fanciful" or merely arguable: **Celador Productions Ltd v. Melville** [2004] EWHC 2362⁶. Where the judge is satisfied not only that there is no defence but there is also no arguable point on behalf of the other party, it is his duty to enter judgment for the applicant: **Anglo Italian Bank v Wells** [1878] 38 L.T. 197.

11. Summary judgment is a harsh remedy that should be granted only where the applicant has established his right to judgment with such clarity as not to give rise to controversy. However, summary judgment applications "can be a tool of great utility in removing factually insubstantial cases from the crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact"⁷.
12. In applications for summary judgment, the court should maintain a delicate balancing act and exercise a lot of caution in deciding whether or not to grant a summary judgment. A classic example is where there are conflicts of facts on relevant issues, which have to be resolved before a judgment can be given. A mini-trial on the facts conducted under a summary process without going through normal pre-trial procedures must be avoided, as it runs the risk of producing summary injustice. The court should also be hesitant in making a final decision without trial where, even though there is no obvious conflict of facts at the time of application, reasonable grounds exist for believing that there is a triable issue or there are factual discrepancies that can only be fully ventilated and dealt with in a trial through exhaustive ventilation and analysis of evidence and other relevant materials.
13. When establishing that he has a defence, it is not enough for the other party to restrict himself to a general denial in his sworn statement. A general denial raises and generates suspicion on the part of the court that the party himself does not believe that he has a defence, for, if he had one, he would have set it out in detail: see **Wallingford v Mutual Society** (1880) 5 App Cas 685. Our own CPR 2017 demands that a party should deal with each fact in the claim and should not deny a claim generally: see O.7 r. 6 CPR 2017.

Discussion and Determination

14. In this matter, it is the contention of the Defendant that he supplied fertiliser worth MK166,656,000 to the Claimant for which he has not been paid. That fact is not disputed at all. The Claimant states that although it got this fertiliser which was in turn, according to it, sold to Seedco, it has in fact not been paid by Seedco. This to say the least would, in the normal circumstances, have been a lame defence which this court

³ Order 14 rule 2

⁴ Order 14 rule 4

⁵ Order 15

⁶ at paragraphs 6 and 7 of the judgment

⁷ **Mt. Pleasant v Associated Elec. Corp. Inc** 838 F. 2d 265 at 278 (8th Cir.1988)

pointing to the fact there was an agreement to the effect that payment for the fertiliser would only be made after Seedco had paid the Claimant. However, what has heavily weighed on my mind, is the assertion by the Claimant that the fertiliser which was delivered to it by the Defendant was in fact stolen from a third party. This raises issues as regards whether the Defendant had acquired good title to the fertiliser which he would legitimately be able to pass to the Claimant. Assuming indeed the fertiliser was stolen, whether the Defendant would be entitled to be paid would depend on a number of factors including whether he acquired the fertiliser as a bona fide purchaser. And there is the issue raised by the Claimant that it suffered loss as a result of it supplying stolen fertiliser to Seedco. These issues are serious triable issues which can not be swept under the carpet or wished away just like that. These are triable issues which will have a significant impact on the Defendant's claims against the Claimant. This, in my view, is not one of those cases which can be summarily dealt with. The Claimant deserves his day in court for, if he is able to prove the assertions made in his pleadings and sworn statements, then the impact on the Claimant's case is most likely going to be significant. In the circumstances, the Defendant's application for an order of summary judgment is dismissed with the attendant costs to the Claimant in any event. These costs will either be agreed by the parties or assessed by the Assistant Registrar at the conclusion of the matter.

Delivered in chambers this 5th day of December, 2023 at the High Court, Commercial Division, Blantyre Registry.



M.T. Msungama
Judge

