IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CASE NUMBER 267 OF 2016

COUNTRYWIDE HOTELS LTD.....**1ST PLAINTIFF**

COUNTRYWIDE CAR HIRE ..... **2ND PLAINTIFF**

VERSUS

BUSINESS PARTNERS INTERNATINONAL SME FUND LTD.....**DEFENDANT**

CORAM: **HON. JUSTICE J. N. KATSALA**
Katuya, of counsel for the defendant/appellant
T. Chokotho, of counsel for the plaintiff/respondent
E. Makombe, Court Clerk

JUDGMENT

The parties in this matter are dissatisfied with the decision by the Assistant Registrar made on 6 February 2018 allowing the defendant to file a Notice of Appointment to Tax Costs out of time on condition that the taxed costs be reduced by 50 percent as compensation to the plaintiffs for the prejudice they may have suffered due to the extension. The defendant appeals against that part of the order reducing its taxed costs by 50 percent. The plaintiffs appeal against that part of the order extending the time within which to file the Notice of Appointment to Tax Costs.

On 1 November 2016, the plaintiffs commenced an action against the defendant by way of Originating Summons seeking an order of specific performance of a financing agreement in the sum of K455 million. Alternatively, the plaintiffs prayed for an order for the payment of a sum of K39,422,332.44 allegedly being a refund of expenses incurred pursuant to the financing agreement, and damages for breach of agreement. The defendant filed and served an affidavit in opposition to the originating summons in which it denied liability in every respect. On the

plaintiffs' application, the court ordered that the matter should continue as if it was commenced by writ of summons. The matter was set down for hearing on 3 July 2017. However, on 30 June 2017 the plaintiffs filed a notice withdrawing the action. On 18 November 2017 the defendant filed a Notice of Appointment to Assess Costs returnable on 15 January 2018. On 12 January 2018 the plaintiffs filed a Notice of a Preliminary Objection to the assessment of costs on the ground that the appointment was filed out of time in terms of Order 31, rule 12 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter the Civil Procedure Rules (CPR)). On being served with this notice, the defendant then filed a Notice of its intention to orally apply for extension of time within which to file the Bill of Costs for assessment on the ground that the delay was occasioned by industrial action by the support staff in the Judiciary which started on 1 August 2017. After hearing arguments, the Assistant Registrar granted the defendant's application for extension of the time to file the bill of costs. The extension was to apply retrospectively up to 18 November 2017, the date the defendant filed its notice of appointment to assess costs. Further, he ordered that the defendant's costs be reduced by 50 percent as compensation to the plaintiffs for the prejudice they had suffered as a result of the extension of time since, upon the expiry of the time within which the bill was supposed to be filed, the plaintiffs had legitimately expected that the defendant would not claim the costs.

I have heard the case afresh since an appeal from a decision of the Registrar is by way of rehearing. I have heard arguments from counsel on both sides for which I am very grateful.

Order 10, rule 1 of the CPR allows a party to a proceeding to make an application for an interlocutory order or a direction of the court in the format prescribed in Form 4. However, rule 2 of the Order allows a party to make an oral application during a proceeding and also allows the court to make an order on such oral application. In my considered view, it is very imperative that we must understand the circumstances in which an oral application can be allowed. The default position on making applications is that contained in rule 1. The position in rule 2 is an exception. As such, there must be good reasons why the exception and not the default position must apply. In my judgment, a party would be allowed to make an oral application where, for instance, it would be inexpedient for him to file a written application. This could be due to the urgency of the matter, or because the cost of making a written application greatly outweighs the benefits thereof, or the subject matter of the application is not contentious (as to warrant long and or substantial arguments) - such as where a party seeks to amend a typographical error in a pleading. Also, in cases where, generally, a party is not required to furnish evidence to support the application. This list is only illustrative and is not exhaustive.

In an application for an order to extend time within which to file a proceeding out of time, usually a party is required to explain the delay to the satisfaction of the court, and/or to show that the delay could not have been avoided and/or is not inordinate. The explanation can only be made by giving evidence. In most cases that evidence is given by way of a sworn statement. It is only fair that in such a case, the opposite party must be given an opportunity to examine the evidence adduced by the applicant and be able to challenge or discredit it. Hence, the application is heard *inter partes*. I do not think such an application can ordinarily fall under the exception in Order 10, rule 2 of the CPR. As is evident in the present case, in its summons, the defendant says the delay was occasioned by the industrial action by the support staff of the Judiciary. And in his submission before the Assistant Registrar and this Court, the defendant's counsel added that the industrial action

commenced on 1 August 2017 and lasted for three weeks. Such allegation was made in the course of counsel's oral submissions - and we all know that that is not evidence – as, generally speaking, counsel cannot testify from the Bar.

Order 31, rule 12(1) of the CPR provides that a bill of costs must be filed for assessment within 3 months from conclusion of the proceedings. This means that the defendant had up to 30 September 2017 to file the bill of costs. The defendant has offered no explanation why the bill of costs was not filed in the month of July (before the alleged industrial action by the court support staff) or indeed within the four or five weeks between the end of the strike and 30 September 2017. In the absence of that explanation and looking at the circumstances of this case, I am unable to say that it would have be injudicious to require the defendant to file a written application for the extension of time to file the bill of costs. I do not see any urgency in the matter that would have made the filing of a written application and a sworn statement in support thereof impracticable. The defendant was merely lazy, sleazy and casual in its handling of the matter. Probably, that explains why the defendant proceeded to file the bill of costs out of time without first applying for extension of the time within which to file it.

In my view, the correct way of proceeding would have been for the defendant to first apply for the extension of the time before filing the bill of costs. That is the sense I am getting from Order 31, rule 12(2) of the CPR which allows a party to apply to court for the extension of the time for the filing of a bill of costs. The defendant was very presumptuous when it proceeding to file the bill of costs before obtaining the extension. It proceeded on the basis that the granting of an extension is a matter of course. In my view, that is wrong and dangerous more especially bearing in mind the overriding objective in Order 1, rule 5 of the CPR. The court is charged to actively manage each case that is before it. As part of active case management, the court must control the progress of the proceeding before it by among other things ensuring that the time tables fixed or the directions given or the rules of procedure are complied with. As such, a party's failure to comply with the rules of procedure or time table or direction is not a small matter. If we are to optimally utilize the limited resources that are available to the court there is need for the court to be vigilante in the management of the cases before it. Otherwise, resources will be wasted on proceedings which are necessitated by sheer laziness, ineptitude or inadvertence on the part of the parties and/or counsel as is the case in the present matter. (see *Mike's Trading Group Ltd v NBS Bank Ltd and Attorney General* Commercial Cause Number 78 of 2014 (unreported) for a detailed discussion of the overriding objective).

Inasmuch as Order 2 of the CPR provides that failure to comply with the Rules (the CPR) or a direction of the court is an irregularity and that it does not render a proceeding a nullity, it does not mean that the guiding principle is "to do substantial justice without undue regard to technicality". The Rules are very important in the dispensation of civil justice hence strict compliance with the Rules must be demanded at all times. Failure to comply with the Rules must not be celebrated. It must be abhorred and where necessary, dealt with firmly. And that is why Order 2, rule 3 of the CPR lists some of the many sanctions that can be imposed by the court for noncompliance with the Rules.

On the foregoing, it is my judgment that it was irregular for the defendant to file the bill of costs out of time without first seeking from the court an extension of the time for filing. It was also

irregular for the Assistant Registrar to allow an oral application for the extension of the time to file the bill of costs. The application should have been made in writing in the prescribed form and supported by a sworn statement explaining the delay and why the time should be extended. This would have provided the plaintiffs with the opportunity of challenging and/or discrediting the information proffered by the defendant and also to come to court with informed arguments on the application. Further, the court would have had sufficient material to enable it to exercise its discretion judiciously. (see *Chiume v Attorney General* [2000 – 2001] MLR 102). In the absence of such material the application was incompetent.

In the result, it is my judgment that the appeal by the plaintiffs must succeed. The defendant's Notice of Appointment to Assess Costs filed on 18 November 2017 was irregular. It was filed before the defendant had obtained the court's permission to file it out of time. Thus, the defendant had no lawful authority to file the it. And also, the application did not provide sufficient material on which the court could have exercised its discretion to allow or refuse the extension of time. Therefore, I set aside the defendant's said notice. Further, I am unable to agree with the Assistant Registrar on his decision extending the time for the filing of the bill of costs. For the reasons I have already given above I find that it was erroneous for the Assistant Registrar to entertain and allow the defendant's oral application for the extension of the time for the filing of the bill of costs. Therefore, the decision cannot stand. I set it aside.

In the circumstances, it is obvious that the defendant's appeal against the Assistant Registrar's decision to reduce its costs by 50 percent automatically fails. The defendant will bear the costs of the appeal and of the proceedings before the Assistant Registrar. I order accordingly.

Pronounced at Blantyre this 17th day of April 2018.

J N KATSALA
JUDGE

THE HIGH COURT
(COMMERCIAL DIVISION)
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