IN THE HIGH COURT OF MALAWI
(COMMERCIAL DIVISION)
LILONGWE REGISTRY
COMMERCIAL CASE NO. 12 OF 2013

BETWEEN:

NATIONAL BANK OF MALAWI LIMITED.....PLAINTIFF

and

MAJUBA MPHANDE t/a M.M LOGISTICS .....DEFENDANT

UNITED GENERAL INSURANCE ..... THIRD PARTY

Coram: **Hon. Justice Annabel Mtalimanja**

Mr. Chikumbutso Sitima, Counsel for the Plaintiff
Mr. Gift Nankhuni, Counsel for the Defendant
Mr. Happy Mwangomba, Counsel for the Third Party
Mr. Eric Ndhlazi, Court Clerk
Mrs. Gertrude Nkhata, Court Reporter

Mtalimanja, J

JUDGMENT

Background

1. On 22nd October, 2013 the Plaintiff entered into a Master Lease Agreement (hereinafter referred to as the "Agreement") with the Defendant, under which the Bank granted him a finance lease facility for the sum of K16 million. The facility was to enable him purchase a Freightliner Horse truck Reg. No. CK 3031 and a Flat Deck Trailer Reg. No. SA 5224 (hereinafter referred to as the "vehicles").

2. One of the terms of the Agreement required the Defendant to keep the vehicles comprehensively insured to their full replacement value by insurers approved by the Plaintiff. Pursuant to this term the vehicles were insured comprehensively with the Third Party under policy number 10208710017592013.

3. Under the Agreement, the Defendant undertook to repay the facility in monthly instalments of K1, 777, 966.24. The Defendant failed to repay the first installment that was due on 22nd November, 2013. He made one payment in June 2014 of K1, 224, 808.21. The facility fell into arrears and as at 22nd June, 2015, the balance outstanding was K29, 398, 401. 50.

4. This now is an action by the Plaintiff claiming payment of the said outstanding balance, interest on this sum at the Plaintiff's lending rate plus 10% penalty rate, from 22nd June, 2015 to the date of payment, statutory collection charges and costs of the action.

5. The Defendant denies liability for the Plaintiff's claim in its entirety. He contends that the sole purpose of the Agreement was to use the vehicles for business, from the proceeds of which he would be repaying the facility.

However, the vehicles were involved in an accident on 16th November, 2013, such that the contract was frustrated. The only remedy for the Plaintiff was to recover the funds using the insurance cover with the Third party. The contract having been frustrated, the Plaintiff is precluded from claiming interest from the date of frustration. In the alternative, the Defendant is precluded from claiming interest from the date they repossessed the vehicles.

6. The Third party's position is that it never received any claim whatsoever from the Defendant requiring indemnification in relation to the accident. Therefore, the Defendant was in fundamental breach of the insurance policy entitling the Third Party to repudiate the same.

Standard and burden of proof

7. This being a civil matter, the applicable standard of proof is proof on a balance of probabilities - see ***Miller v Minister of Pensions [1947] 1 All ER 372***. The burden of proof rests upon the party asserting the affirmative of the issue – see ***Malawi Distilleries Ltd v Sichilima [2001-2007] MLR (Com) 164***.

Analysis and findings

8. It is not is dispute that on 22nd October, 2013 the Plaintiff granted the Defendant the finance lease facility of K16 million under the Agreement. The parties agreed that the Defendant would repay the facility across a period of 24 months, at an initial rate of base lending rate of 35% plus 5% making an effective rate of 40% per annum, subject to change at the sole discretion of the Plaintiff. The first installment was due in November 2013, which, contrary to the Agreement, the Defendant did not pay. It is also not in

dispute that the Defendant only made one payment and that he was indeed in arrears.

9. By Clause 1.2 of the Agreement the Defendant undertook to pay all rentals and other moneys payable strictly on the due date. He further undertook to pay interest on arrears at such rate as may be reasonably be required by the Plaintiff, calculated from due date until date of payment thereof.

10. Whilst admitting to be in arrears on the facility, the Defendant contends that the contract was frustrated since the vehicles were damaged in an accident. In his evidence the Defendant testified that the vehicles were involved in an accident on 16th November, 2013. He immediately verbally reported the accident to the Plaintiff through its officer, a Mr. Ernest Chitibu, who he had hitherto, been dealing with for some time. Mr. Chitibu promised to process the insurance claim since he was the one who had arranged the same.

11. Since he had so reported the accident, he reckoned that the Plaintiff would recover the balance outstanding on the facility from the Third Party as the insurer of the vehicles. When he realized that the Plaintiff had not reported the accident to the Third Party, he reported the same through his lawyers in 2016.

12. Mr. Chiwanda for the Plaintiff testified that the Defendant did not report the accident to the Plaintiff as purported in his evidence. He further testified that, firstly, as per the Agreement, it was the Defendant's responsibility, as the insured, to report the accident to the Third Party. Secondly, under the insurance policy, the Third Party's responsibility was limited to the repair of

damages to the vehicles and did not extend to repayment of the facility arrears.

13. Mr. Solomon for the Third Party testified that the Third Party was not privy to the Agreement. The Third Party insured the vehicles to cover their repair in case of damage and to pay third party claims up to the agreed limits. It was a fundamental term of the insurance policy that the insured would immediately report to the Third Party of any eventuality that would give rise to a claim like an accident. In breach of the policy, the Defendant did not report the accident to the Third Party at any time prior to commencement of this action.

14. He further testified that the Defendant only reported the accident to the Third Party on 4th April, 2016 through his lawyers, after this action was commenced. By the time this report was received, the vehicles had already been sold such that it was impossible for the Third Party to assess the damage occasioned by the accident, in order to determine the amount payable for their repair. In any event, the insurance cover was not security for the loan, as the Third Party's obligation was limited to the repair of damages. The Third Party could not discharge this obligation without receiving a report from the insured.

15. On the basis of the Agreement that the Defendant entered into with the Plaintiff and the insurance policy he entered into with the Third Party, I find the Defendant's argument that the Agreement was frustrated by the accident to be misconceived for two reasons.

16. Firstly, the Agreement expressly provided for the procedure that the Defendant was to follow in the event something happened to the vehicles. By Clause 4.2 the parties agreed that the Defendant was to immediately notify the Third Party in writing of any happening relating to the vehicles which was likely to give rise to a claim under any policy and at the same time forward to the Plaintiff a copy of such notification. Secondly, by clause 5 of the Conditions of the insurance policy, the Defendant agreed with the Third Party that in the event of any occurrence which may give rise to a claim, he should immediately notify the Third Party.

17. Clearly the accident was an eventuality giving rise to a claim under the insurance policy. Therefore upon the occurrence of the accident the Defendant should have reported the same to the Third Party in writing to activate the insurance cover.

18. In his testimony the Defendant testified that the Plaintiff, and not him, was the insured under the policy and therefore responsible to notify the Third Party of the accident. However, this is not borne out by the evidence. Mr. Chiwanda testified that one of the terms of the Agreement was that the Defendant should keep the vehicles insured on a comprehensive basis to their full replacement value by insurers approved by the Plaintiff.

19. Under these auspices the Defendant duly applied for and insured the vehicles under the Plaintiff's Bancassurance scheme. He was offered an additional loan of K597, 997.39 so that he could insure the vehicles, which he did with the Third Party.

20. An examination of the proposal for bancassurance motor comprehensive forms submitted in evidence as Exhibits P3(a) and 3(b) shows that the Defendant personally applied for the insurance cover. He also declared in the forms that the proposal shall be the basis for the contract between the Third Party and himself. I thus find that the Defendant was the insured under the policy. This is fortified by the insurance certificates (Exhibit P4) that show that they were issued in the Defendant's name as the insured. Being the insured, the Defendant cannot shirk the responsibility to report the accident under the insurance policy.

21. In cross-examination, the Defendant testified that he was not aware of the terms of the Agreement because he was not given a chance to read the same before appending his signature. Further, he also testified that he was not aware of the terms and conditions of the insurance policy because he was not given a copy thereof.

22. The law is more than settled that a party to a contract who signs a contractual document which contains terms and conditions is bound by them. In the absence of fraud and misrepresentation, it is certainly no defence for the Defendant to say that he did not see or read the terms and conditions in the two documents or to say they were not brought to his attention – ***Selemani and another v Advanx (Blantyre) Ltd [1995] 262 (HC)***. I therefore find that the Defendant is precluded from reneging from the Agreement and the insurance policy that he not only voluntarily signed and but also benefited from with the purchase of the vehicles.

23. Having voluntarily entered into the Agreement and the insurance policy, the Defendant is bound by the terms of these two documents. I thus find that the Defendant had the responsibility of reporting the accident to the Third Party, which he failed to discharge.

24. In any event, notwithstanding the failure to report the accident to the Third Party, the crucial and determinitive factor in this action is that the insurance cover with the Third Party was not security for the finance lease facility. Clause 4.7 of the Agreement provided that in the event of damage to the vehicles, the proceeds of any insurance claim were to be applied to the cost of repairs, and the Defendant was liable for any difference between such proceeds and the full costs of the repairs. By section I clause 1 of the insurance policy, the insurance cover was limited to indemnifying the Defendant against loss or damage to the vehicles and its accessories.

25. There is therefore no basis to conclude that the Third Party was responsible to pay off the balance outstanding on the facility after the Defendant failed to repay the same. Thus, even if the Defendant had duly reported the accident to the Third Party, the obligation of the Third Party would have been limited to repairs of the damage to the vehicles. There would still be no legal basis to justify the Defendant's contention that the Third Party should have cleared his arrears on the facility.

26. By failing to report the accident immediately, and in any event before the vehicles were sold, the Defendant absolved the Third Party of its obligation to repair any damage to the vehicles. On this premise I find that the Third Party is not liable to indemnify the Defendant as claimed.

27. As indicated the Defendant admits to obtaining the finance lease facility and that he was supposed to repay the same in monthly instalments. The chronology of events shows that he was in default right from the beginning when the first installment fell due on 22nd November, 2013. By the Statement of Claim the Plaintiff averred that as at 22nd June, 2015, the balance outstanding was K29, 398, 401.50.

28. By clause 5.2 of the Agreement, the parties agreed that should the Defendant fail to pay any rental within 7 days of the due date, the Plaintiff would have the right to terminate the Agreement and re-take possession of the vehicles, without prejudice to any claim which it may have against him, including any claim for damages. Upon re-possession of the vehicles, clause 6.1 gave the Plaintiff the right to sell the goods within such period and in such manner and on such terms as it deemed reasonable in its entire discretion.

29. By clause 6.2 the Plaintiff was mandated to apply the net proceeds of the sale towards discharging the Defendant's outstanding liability. In the event the said proceeds were insufficient to discharge the said liability, the Defendant was required to make good on the deficit. The Plaintiff was to pay the Defendant any surplus, if any, remaining after the discharge.

30. Mr. Chiwanda testified that following the Defendant's default in repaying the facility, the Plaintiff wrote him a Notice of Default on 25th February, 2014. The Notice required him to clear the outstanding arrears before 4th March, 2014, failing which the Plaintiff may exercise its right to re-possess the vehicles. No response having been received from the Defendant by that date, the Plaintiff engaged debt collectors to re-possess the vehicles. On 30th

April, 2014, the debt collectors wrote the Plaintiff reporting that the vehicles had been re-possessed, however they were in a state of disrepair.

31. Owing to the state of disrepair, the Plaintiff was only able to sell the vehicles for K2, 415, 000 (being K500, 000 for the Freightliner Diesel Horse Reg. No CK 3031 and K1, 915,000 for the Tri-Axle Deck Trailer Reg. No SA 5224). Both these amounts were applied towards the Defendant's outstanding liability.

32. On the premise of clauses 5.2, 6.1 and 6.2, I have no doubt in my mind that having agreed to these terms and following the Defendant's default, the Plaintiff was entitled to re-possess and sell the vehicles to recover the outstanding balance on the facility. Since the K2, 415, 000 that was realized from the disposal of the vehicles was insufficient to clear the liability, the Plaintiff was within its rights to commence this action to recover the deficit. I thus conclude that this action is not frivolous and an abuse of process as argued by the Defendant.

33. As indicated, the parties agreed that the Defendant would repay the facility across 24 months at an initial interest rate of base lending rate of 35% plus 5% per annum, subject to change at the sole discretion of the Plaintiff. In clause 1.2 of the Agreement, the Defendant agreed to pay interest on arrears at such rate as may be reasonably required by the Plaintiff, calculated from the due date until payment thereof. I find that having contractually agreed to pay interest on the arrears, it is disingenuous of the Defendant to deny to pay the same.

34. From the foregoing, I find that the Defendant is liable to repay the Plaintiff the balance outstanding on the finance lease facility and interest as agreed in the Agreement. I therefore enter judgment for the Plaintiff as pleaded in the Statement of Claim. I further find that the failure of the Defendant to report the accident to the Third Party absolved the said Third Party of its obligation to pay for the damages to the vehicles. The Third Party action is therefore dismissed in its entirety.

35. Ordinarily costs follow the event. I therefore award the Plaintiff and the Third Party costs of the action.

Pronounced in Lilongwe this 18th Day of March, 2020.

Annabel Mtalimanja
JUDGE