IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 184 OF 2008

G. S. SADYALUNDA t/a CHANYUMBU TRADING.....PLAINTIFF

AND

STANDARD BANK LIMITED .....DEFENDANT

CORAM: **HON. JUSTICE J.N. KATSALA**
E. Banda, of counsel for the Plaintiff
Mr. Msusa, of counsel for the Respondent
Pindani, Principal Court Reporter
Gwedeza, Court Clerk

JUDGEMENT

The plaintiff commenced this action by writ of summons seeking an order for the return of vehicles or the sum of K40.8 million being the value thereof, damages for loss of use of the said vehicles at MK31,678,560.00, damages for breach of contract or damages for loss of business profits, damages for defamation and costs of this action. The defendant denies the claims and counter claims for the total sum of K36,227,465.44 being the monies outstanding on a loan and lease facility granted to the plaintiff, and interest.

The facts of the case are that on or about 23 April 2007 the plaintiff entered into a contract with the National Food Reserve Agency (NFRA) for the supply of 5,000 metric tons of Non-GMO White Maize to the NFRA at a total price of K130 million. He was required to supply the maize within a period of 45 days from the date of contract. The plaintiff then approached the defendant for a loan to allow him to fulfil the contract and also to buy trucks

for his transport business. The defendant agreed to offer the facilities. In a Facility Letter dated 24 April 2007 (exhibit GS2) the defendant set out the terms on which the facility was offered to the plaintiff. The defendant granted a Short Term Loan of K20 million, a Vehicle and Asset Finance Loan of K4.2 million and an Insurance Premium Finance of K900,000. The last two were said to be "subject to terms and conditions set out in a separate agreement".

According to the clause 4.2 of the Facility Letter, the Short Term Loan facility was to be repaid by one bullet payment by 29 June 2007. As per clause 4.3, the capital amount of the loan was to be repaid in one instalment payable on the 30th day of each month commencing on 29 June 2007. The interest was to be serviced separately on a monthly basis, on a date convenient to the defendant commencing in the month of drawdown (clause 4.4). The interest was to be charged at 5% above the defendant's base lending rate prevailing from time to time (then standing at 22.5% per annum). In the event of the plaintiff defaulting on repayment, interest was to be charged at the rate of 10% per annum above the defendant's base rate. The security for the facilities were to be: - for the Short Term Loan, an assignment of the proceeds from the NFRA contract to the defendant; and the defendant was to get title over the plaintiff's motor vehicle, a Scania truck tractor independently valued at K6 million, for the Vehicle and Asset Finance facility. The Facility Letter also stated that the Short Term Loan facility was to be reviewed on 30 June 2007 and that the defendant reserved the right to extend the Facility beyond the agreed dates. One of the Special Conditions in the Facility Letter provided that the defendant was to retain 18% of the payments into the transactional account for the repayment of the Short Term Loan facility and that the plaintiff could only transfer money from the account with the approval of the defendant (clause 8.2). In this respect the defendant was a co-signatory to the account.

Clause 9 of the Facility Letter was a cross-default clause. It provided that in the event of the plaintiff defaulting on repayment of the Short Term Loan facility or any other facilities granted to him, the full amount of the Short Term Loan Facility and any other facilities accorded to the plaintiff together with interest would immediately become due and payable and also that the defendant would be entitled to exercise all other remedies available to it under the Laws of Malawi. The plaintiff accepted these terms and signed and returned to the defendant a copy of the Facility Letter signifying his acceptance thereof.

By Variation Letters issued by the defendant, the Facility was extended initially to 30 September 2007, then to 30 November 2007 and to 28

February 2008. By a Variation Letter dated 7 May 2007, the Short Term Loan facility was increased to K30 million. In August 2007 it was increased to K40 million. All these increases were done at the plaintiff's instance on the ground that he needed more funds in order to satisfy the NFRA contract. By a Variation Letter dated 7 April (meant to be May) 2007, which amended the Short Term Loan amount to K30 million, the security for the Vehicle and Asset Finance Loan was also amended. The Scania truck tractor was replaced by a 1999 Volvo F10 motor vehicle registration number ZA8670, independently valued by Automotive Products Limited at K6.5 million, and a Flatbed Trailer registration number NB2063 valued at K3.2 million.

By another Variation Letter of 3 August 2007, the Short Term Loan amount was revised to K40 million, and two more motor vehicles were added as security for the Vehicle and Asset Finance Loan. These were a 1990 Iveco Cargo 1414 registration number NS1655 valued by HTD Limited at K6 million, and 2007 Toyota Hilux Single Cab 4WD registration number NS1641 valued at K5.1 million by Toyota Malawi Limited. There was another Variation Letter dated 19 October 2007 which revised the Short Term Loan amount to K27,455,000.00. The last Variation Letter was written on 31 December 2007 which revised the Short Term Loan amount to K24,754,501.48 but the security for the Vehicle and Asset Finance Loan remained as stipulated in the Variation Letter of 3 August 2007.

The NFRA contract was extended on several times at the plaintiff's request because he needed more time to source and supply the maize. The first extension was on 15 June 2007. The contract was extended for a period of 90 days. On 24 September 2007, it was extended to 30 November 2007 and on 29 November 2007 it was further extended to 29 February 2008. These extensions meant that the payments into the transactional account were also delayed which in essence necessitated the variation of the Facility Letter as per the various variation letters already referred to above. This also explains why the defendant opted to apply the Special Condition (clause 8.2) in the Facility Letter which, as earlier stated, provided that the bank would retain 18% of payments received in the transactional account as repayment of the Short-Term Loan facility and not a one bullet payment as per clause 4.2 or a one instalment payment payable on the 30th day of each month as per clause 4.3 of the Facility Letter. It is clear that each one of the payments from the NFRA was not sufficient to extinguish the Short Term Loan at once as the amounts were smaller than the amount of the loan. A total sum of K91,524,412.74 was deposited into the transactional account by the plaintiff. Thus, the defendant retained a total sum of

K21,225,498.52, representing 18% thereof, as repayment of the Short Term Loan.

On the motor vehicles aspect of the Facility, the evidence shows that the plaintiff applied for a motor vehicle loan and he was asked to contribute towards the purchase price of the motor vehicles. He contributed amounts which represented percentages of the purchase prices. For instance, in April 2007 when he got the Facility, he paid the sum of K1.8 million being 30% of the purchase price of K6 million for the Volvo F10 Truck and Trailer Registration Numbers ZA8670/NB2063. He also paid K2,310,000.00 being 30% of the purchase price of the Freightliner Horse and Trailer registration numbers NS1685/NS1698. Further, he contributed the sum of K1,381,835.00 towards the purchase price of a Freightliner Horse and Trailer registration numbers NS1730/NS1735. All these percentages of the contributions and amounts were determined by the defendant. All the motor vehicles were registered at the Directorate of Road Traffic Services in the name of the plaintiff as "Owner" and the defendant as "Title Holder".

On 7 May 2007, after the plaintiff had already accessed the first motor vehicle loan and purchased the Volvo F10 Truck, the defendant prepared a Master Lease Agreement which was to govern the Vehicle and Asset Finance Facility. This was presented to the plaintiff who duly signed it. In terms of this Master Lease Agreement, the motor vehicles were leased to the plaintiff. They were to remain the property of the defendant at all times and nothing was to be construed as conferring on the plaintiff any right or interest in the motor vehicles other than as a lessee. According to this Agreement the defendant was the lessor and the plaintiff was the lessee of the motor vehicles. At no point either during or after the termination of the Agreement was the plaintiff to become owner of the motor vehicles. The plaintiff was to only use the motor vehicles for the agreed period of time and pay to the defendant agreed monthly rentals for such use. Upon the expiry of the agreed period the plaintiff was to retain the possession, use and enjoyment of the motor vehicles under a new lease which would be deemed to be constituted upon the same terms of the expired lease. This new lease would be for a period of one year and would automatically renew in the event that the plaintiff wishes to continue using the motor vehicles. Each of the motor vehicles was added to the Master Lease Agreement through a First Schedule which showed, among other things, the particulars of the motor vehicle, the price thereof (only the amount paid by the defendant), the rental period, and the monthly rentals the plaintiff was to pay. The amounts paid by the plaintiff as his contribution towards the

purchase prices of the motor vehicles were never reflected in the First Schedules.

The evidence before the Court shows that the plaintiff failed to service the Short Term Loan. The reasons for the failure are not very clear. It would appear the NFRA was buying the maize for resale to the Government of Zimbabwe pursuant to a contract for the supply of maize between the Governments of Malawi and Zimbabwe. This contract was eventually suspended before the plaintiff had fulfilled his contract with NFRA. Likewise, his contract with NFRA was suspended subject to further review. This adversely affected his cashflow and was not able to service the Short Term Loan. There is also information that the plaintiff used some of the funds from the Short Term Loan for other purposes, as such, at the time of expiry of the Facility, there was no maize stocks in the plaintiff's warehouse. This development compelled the defendant to demand full payment of the loan by 14 March 2008. The plaintiff pleaded for more time to pay but the defendant refused to grant him his request. The defendant, relying on the cross-default clause of the Facility, then transferred the sum of K835,678.62 from the Vehicle and Asset Finance Loan account to the Short Term Loan account (on which there was a default). The defendant also repossessed all the motor vehicles it financed and those the plaintiff pledged as security and sold them after running a newspaper advertisement calling for bids. At the time of repossession, the sums of K19,758,971.94 and K15,872,338.70 were outstanding on the Short Term Loan and Vehicle and Asset Finance Loan, respectively. Dissatisfied with the turn of events, the plaintiff commenced the present proceedings and applied for a mandatory injunction to compel the defendant to return the motor vehicles. The application for a mandatory injunction was dismissed after full argument.

On these facts, it is the plaintiff's case that he did not default on the Short Term Loan nor on the Vehicle and Asset Finance Loan. He contends that in the event that it is found that he defaulted then he pleads *force majeure*. The default was due to the fact that the Government of Malawi abruptly terminated his contract with NFRA. It was an act that was outside his control. In the circumstances the parties should have re-negotiated the Facility since it was already subject to review from time to time. The defendant's failure to review or renegotiate was a breach of the Facility Agreement. Further, it is contended that the default, if any, did not entitle the defendant to seize the motor vehicles pledged as security and those under the Vehicle and Asset Finance Loan on which there was no default.

It is also the plaintiff's case that the defendant breached its fiduciary duty by creating ambiguous and absurd transactions under the Vehicle and Asset Finance Loan which made the plaintiff to be the loser and the defendant the winner in all circumstances. Also, by taking advantage of the plaintiff and exerting undue influence on him and failing to advise or give him proper advice or informing him to seek independent advice on the transactions. The defendant held that there was a default when there was no default on the Vehicle and Asset Finance Loan, and pretending that there was a default on the Short Term Loan when in fact there was no default, and failing to treat the two loan accounts as separate accounts, wrongfully seizing the motor vehicles when there was no default, and wrongfully pre-arranging the sale of the motor vehicles to third party before the expiry of the period for receiving tenders thereby depriving the plaintiff the opportunity to redeem them, and also selling one of the motor vehicles, a Freightliner Horse registration number NS1685 without first advertising it in the papers. Further, it is the plaintiff's case that the defendant wrongfully charged default interest and penalty interest which is illegal and contrary to public policy as a result whereof the transactions were harsh and unconscionable and ought to be reopened in terms of the Loans Recovery Act. Therefore, the plaintiff seeks an order for the reopening of the transactions and that they be set aside or varied; an order that the security given be altered or released to the plaintiff or damages in lieu thereof in the event that the security has been disposed of; a refund of the sum of K5,491,835.00 being the cash contributions he made towards the purchase prices of the motor vehicles; payment of the sum of K11.1 million being the value of his personal motor vehicles which were pledged as security for the Facility; damages for loss of profits and loss of use of the motor vehicles; and damages for embarrassment, defamation and injurious falsehood.

On the other hand, it is the defendant's case that when the plaintiff sought a loan from it to buy specific motor vehicles, the defendant offered him a lease facility whose full terms were contained in the Master Lease Agreement dated 7 May 2007. The plaintiff accepted the lease facility in writing. Under the lease facility the defendant was the owner of the motor vehicles and only leased and not sold the motor vehicles to the plaintiff. It is the defendant's contention that in terms of the Master Lase Agreement, no leaseback was created and the same could not be possible because none of the leased assets was supplied by the plaintiff. The defendant denies exerting any undue influence on the plaintiff and states that the plaintiff was duly advised in writing to seek independent advice on the nature of the transactions and the implications of the terms and conditions. It was the agreement between the parties under the Facility Letter that in the event

of a default on one facility the defendant would be entitled to transfer any funds standing to the plaintiff's credit to offset any liability of the plaintiff. As such, the transfer of funds from the Chanyumbu Transport account (the Vehicle and Asset Finance Loan account) to the Chanyumbu Trading account (the Short Term Loan account) was lawful and within the provisions of the agreement.

Further, the defendant contends that in terms of the Master Lease Agreement and the default on the part of the plaintiff, it was entitled to seize the assets and sell them even by private treaty since they were its property. In short, the defendant denies breaching the agreement as alleged or at all and counterclaims from the plaintiff the sums of K20,242,119.40 and K15,985,346.04 being the sums outstanding on the Short Term Loan and the Lease Facility, respectively, as at May 2008. The defendant also claims interest on these sums with effect from May 2008 to date of full payment at the contractual default rate of 27.95% which was 10% above the defendant's base lending rate.

At the Scheduling Conference the parties agreed that, despite their extensive pleadings, only three issues must go to trial for the Court's determination. The issues are:

1. Who had the ownership of the motor vehicles under the loan/lease agreement, that is, what were the parties' interests in the motor vehicles?
2. Whether there was default on the part of the plaintiff on the Maize Loan Facility; and
3. What damages, if any, are payable?

I will first deal with the second issue because it seems it is a bit straight forward. It is clear from the evidence before this Court that the plaintiff failed to service the Short Term Loan facility. The plaintiff himself did acknowledge such failure in a letter to the defendant dated 9 April 2008. The relevant parts of the letter read as follows:

> "It is true that the overdraft facility on account number 0140003608200 has remained unserviced for some time due to the fact that we experienced some operational loses and that some monies are stuck somewhere. We want to confirm to you that we will resume servicing the loan as my main line of business is crop buying and that season is just about to start, end this month to early next month.

We will try to pay back the balance as soon as possible but might take some few months starting next month, May, 2008.

Likewise, the lease facility was faced with the challenge that there was no business for the past two months.

Now that tobacco season, cotton and some export for tea have just started, we hope we will catch up and start paying normally.

We thank you in advance for understanding our problem and hope everything will now start moving forward."

Further, in an earlier letter dated 29 February 2008, the defendant wrote to the plaintiff as follows:

"**Maize Loan Facility**

Reference is made to the meeting that we had yesterday at your office regarding the above subject matter.

In our meeting we noted that you breached our contract by using part of the funds that were intended to finance the maize deal for other purposes and that the facility has expired but there is no maize stock in your warehouse to cover the Bank's exposure.

We therefore advise that you are required to make arrangements and pay off the loan by 14th March 2008, failing of which we may have to commence legal proceedings against you."

During cross examination the plaintiff insisted that he did not default on the maize facility. In my judgment, the evidence is clear that the plaintiff defaulted. He failed to service the facility and he unequivocally admitted it in his letter of 9 April 2008 reproduced above. Further, all the evidence shows that he failed to service the facility despite the indulgence that was granted to him by the defendant. He may think that he had good explanation for the failure but that does not mean that he did not default. Failure to service a facility as agreed between the parties is a default regardless of whatever reasons one may have for the failure. I do not think there is much that can be said on this point.

The issue taken up by the plaintiff that the defendant breached the agreement when it transferred funds from the transport (asset) account to the maize account though not one of the substantive issues for determination in this matter, calls for a brief comment. First, this issue was ably dealt with during the determination of the plaintiff's application for the mandatory injunction for the return of the repossessed motor vehicles. The

judge discussed the law on this point and found that the defendant was within its rights as a banker to effect the transfer of the funds. I entirely agree with the analysis by the judge and his findings. For this reason, I do not find it necessary to address the issue again in this judgment as I will not reach a different conclusion.

I now come to the issue of who had the ownership of the motor vehicles under the loan/lease agreement, that is, what were the parties' interests in the motor vehicles? In my view, it would be easier if the issue were split into two. First, in respect of the plaintiff's personal motor vehicles which were allegedly pledged as security, and secondly, the motor vehicles purchased under the Vehicle and Asset Finance Loan.

It is not in dispute that at the time the plaintiff approached the defendant for the Facility, the plaintiff owned two motor vehicles, a Toyota Hilux registration number NS1641 and an Iveco Truck registration number NS1655. The motor vehicles were valued at K5.1 million and K6 million, respectively. It is also not in dispute that the plaintiff pledged these motor vehicles as security for the Short Term Loan facility when the plaintiff needed more funds and increased the loan amount from the initial K20 million to K30 million. According to the Variation Letters dated 3 August 2007 and 31 December 2007, the defendant was to get title over the two motor vehicles. It is clear from the evidence before me that the security was perfected by having the defendant's name endorsed on the motor vehicles' Registration Certificates as the 'Title Holder' while the plaintiff remained as the 'Owner'.

The definition of title holder and owner in relation to a motor vehicle in the Road Traffic Act is very significant. It subjects the property rights in a vehicle to the contractual setting in which the rights of use, possession, nominal and legal title are interwoven. Section 2 provides as follows: -

> "owner" in relation to a vehicle, means—
>
> (a) the person who has the right to the use and enjoyment of a vehicle in terms of a contractual agreement with the title holder of such vehicle;
>
> (b) any person referred to in paragraph (a), for any period during which such person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a);
>
> (c) the person who is a title holder and has the use and enjoyment of the vehicle; or

(d) a motor trader who is in possession of a vehicle for the purpose of sale, and who is registered as such under section 11; and "owned" or any like word has a corresponding meaning;

"title holder" in relation to a vehicle, means—

(a) the person who has to give permission for the alienation of that vehicle in terms of a contractual agreement with the owner of such vehicle, or

(b) the person who has the right to alienate that vehicle,

and who is registered as such under section 11."

From the foregoing provisions, it is clear that the plaintiff, as the owner, had the right to the use and enjoyment of the motor vehicles. The plaintiff's use and enjoyment of the motor vehicles was subject to the agreement between the plaintiff and the defendant as contained in the Facility Letter and the Variation Letters issued subsequent thereto.

On the other hand, the defendant, as the title holder, had the right to alienate the motor vehicles. In other words, the defendant had the right to transfer the property and/or ownership of the motor vehicles. As the title holder, they had the right to sell the motor vehicles. (See *NBS Bank Ltd v Modern Business Management Ltd and Henry R Mwale*, Commercial Case Number 81 of 2012 (unreported)). They did not need the plaintiff's sanction to such sale. They had the right to sell even where the owner was against the sale provided the event(s) agreed to trigger such action had arisen.

In the circumstances, I do not see how the plaintiff can now start to question the defendant's authority to repossess the motor vehicles and even to sell them in view of the fact that his right to use and enjoyment was subject to his continued performance of the Short Term Loan. Having defaulted on the Short Term Loan, the plaintiff forfeited his right to the use and enjoyment of the motor vehicles. Thus, the defendant became entitled to take possession of the motor vehicles and to deprive the plaintiff of the use and enjoyment of the same.

Further, by having the defendant endorsed on the motor vehicles' Registration Certificates as the title holder, it is clear that it was the intention of the parties that the plaintiff should be barred from disposing of the motor vehicles whilst the Short Term Loan was still subsisting. In other words, the motor vehicles were pledged as security for the Short Term Loan. Otherwise, there would have been no reason for such endorsement.

And since the motor vehicles were pledged as security for the Short Term Loan, once there was default, the defendant became entitled to realise the security in order to recover the outstanding amount or minimise its losses. So, the defendant was perfectly entitled to sell the motor vehicles and to apply the proceeds thereof towards the repayment of the Short Term Loan. Therefore, it is my judgment that the defendant cannot be faulted for proceeding in the manner it did in this respect.

As regards the motor vehicles sourced under the Vehicle and Asset Finance Loan, as earlier stated, the evidence before me shows that the plaintiff applied for a loan to buy trucks for his Chanyumbu Transport business. In the Facility Letter the defendant indicated that it had granted him a Vehicle and Asset Finance Loan. The plaintiff signed the Facility Letter to signify his acceptance of the terms therein. In the Facility Letter and in all the Variation Letters, the plaintiff is referred to as "the Borrower". This is regardless of the facility being referred to, that is, either the Short Term Loan or the Vehicle and Asset Finance Loan. In my simplistic logic, this means that the defendant is the "Lender". Because I do not see how the plaintiff can be a borrower in this transaction if the defendant is not a lender. So, it is clear to me from the evidence before me that at the time of entering into the agreement as evidenced by the Facility Letter, the parties' intention was that the Vehicle and Asset Finance Loan was to be a loan facility and not a lease facility.

Further, the evidence also shows that the plaintiff was asked to contribute towards the purchase prices of the motor vehicles. He contributed 30% of the purchase prices for the purchase of the Volvo F10 Truck and trailer which was paid direct to the supplier, Automotive Products Limited. The K4.2 million loan granted by the defendant in the Facility Letter was the 70% balance on the purchase price. The same arrangement was made on the purchase of the Freightliner Horse and trailer where the plaintiff paid 30% of the purchase price. On the third motor vehicle, the Freightliner and trailer, he was asked to pay 15% of the purchase price. In my view, this arrangement reinforces the fact that the Vehicle and Asset Finance Loan facility was indeed a loan facility as described in the Facility Letter and not a lease facility as is now alleged by the defendant. I do not believe that the plaintiff would have been required to contribute towards the purchase of the motor vehicles if the facility were a lease.

The defendant's witnesses told the Court that the plaintiff's contributions were applied towards the initial rentals under the Master Lease Agreement. I do not find this to be correct. It is a deliberate attempt to mislead the Court because the documents produced by the defendant in evidence do

not support this assertion. In fact, they clearly contradict this assertion. The First Schedules for each of the three motor vehicles, which show, among other things, the commencement and termination date of the lease, the cash price (principal debt), that is, the amount paid by the defendant to purchase the asset, the total finance charges, number of rentals, amount of rentals, first rental date, initial rental payable, and arrangement fees do not show that the plaintiff paid any initial rentals in respect of the motor vehicles. If the plaintiff's contributions were indeed initial rentals, why were they not shown on the First Schedules? And if indeed they were initial rentals, why were they paid direct to the suppliers of the motor vehicles and not to the defendant? Why would rentals be payable to the seller of the motor vehicles and not the defendant, the person hiring the motor vehicles out to the plaintiff? These are questions which the defendant's witnesses failed to give satisfactory answers to. At the end of the day I was left with the impression that these witnesses were not truthful and/or did not fully understand the essence of the transaction the defendant had actually entered into with the plaintiff. And sadly too, they did not fully understand the nature of the facility the defendant, as a bank, was offering to its customers. Thus, it is not surprising to see the high degree of confusion prevailing amongst them as regards the facility the defendant granted to the plaintiff.

It is also in evidence that the issue of the Master Lease Agreement was introduced after the Facility Letter had already been accepted and signed by the plaintiff and also after the loan had already been disbursed. The defendant prepared the Master Lease Agreement and gave it to the plaintiff for his signature which he appended. The parties agree that there was no discussion between them to spell out to the plaintiff the fact that the Vehicle and Asset Finance Loan, in practical terms, was to be converted to a lease agreement. Or that the defendant does not give loans to its customers to finance the purchase of motor vehicles but it only buys and leases the motor vehicles to the customers.

In my judgment, it was imperative on the part of the defendant to inform the plaintiff explicitly and candidly that it does not grant loans to its customers for the purchase of motor vehicles. This duty arose because the plaintiff had expressly applied for a loan in order purchase a motor vehicle. And in response to the plaintiff's application the defendant wrote the Facility Letter dated 24 April 2007 addressed to the plaintiff. In part, the letter read as follows: -

> "Stanbic Bank Limited ... offers to provide Geoffrey Shozi Sadyalunda trading as Chanyumbu Trading ("the Borrower") with the under

mentioned banking facilities ("the Facilities") subject to the terms and conditions set out herein and on the attached general terms and conditions applicable to overdraft and other banking facilities..."

The letter went on to list down the facilities offered, that is, a Short Term Loan, a Vehicle and Asset Finance Loan and Insurance Premium Finance. In my understanding, what the defendant was saying is that it was offering to provide to the plaintiff the facilities listed therein which included a Vehicle and Asset Finance Loan. In ordinary understanding, this meant that the plaintiff's request for a loan to purchase a motor vehicle was approved and had been granted by the defendant.

In terms of contract law, an offer is a statement of willingness by one party to enter into an agreement and is comprised of specific and defined terms. The offer must be full, complete, specific and capable of being accepted. It must include the fundamental terms of the agreement with the intention that no further negotiations are to take place. See *Mkandawire v Wawanya* 15 MLR 270 and *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 246. The definite offer tendered by one party must be met by a definite acceptance from the party to whom it is made. See *Abeles v Viola* [1992] 15 MLR 1. Once a definite acceptance is made, it constitutes a final and unequivocal acceptance of all the terms of the offer. Where a definite offer has been made and accepted and the offer and acceptance contained all material terms agreed by the parties, an agreement has been concluded. And subsequent negotiations cannot affect the terms of the agreement except with the consent of both parties. See *Concrete Products Ltd v Universal Shipping Co Ltd* [1992] 15 MLR 118 and *Bellamy v Debenham* [1890] 45 Ch D 481.

Applying these basic principles of contract law, it is clear to me that the Facility Letter was a statement by the defendant expressing its willingness to enter into the agreement therein with the plaintiff. The Facility Letter contained definite and specific terms of the agreement. It is important to note that though the Facility Letter had documents containing the general terms and conditions of the agreement which the plaintiff was also required to sign, the Master Lease Agreement was not amongst those documents. The Facility Letter contained the offer from the defendant to the plaintiff. The evidence is clear that the plaintiff accepted the offer without any reservations. That is, he proffered a definite acceptance, consequently, unequivocally accepting all the terms of the offer. This means that the contract was concluded at that point and that subsequent changes to the agreement could only be made with the plaintiff's knowledge and consent.

Thus, I fail to see how it can be said that the facility granted to the plaintiff was a motor vehicle lease facility and not a motor vehicle loan facility when it is clear that the offer made by the defendant to the plaintiff did not include a motor vehicle lease facility. It does not advance the defendant's case for the witnesses to come to court and testify that the facility offered was a lease simply because the defendant does not offer loans for the purchase of motor vehicles but only offers lease facilities to its customers.

What the defendant offered to the plaintiff is very clear from the Facility Letter. So too is what the defendant did not offer. Likewise, what the plaintiff accepted is very clear. I am sure if the defendant wanted to offer a motor vehicle lease facility to the plaintiff it would have said so in the Facility Letter. And had the defendant expressly stated in the Facility Letter that it does not grant the type of loan applied for but instead it grants motor vehicle lease facilities, the plaintiff would have been put on full alert and would have had to think twice before accepting the offer. As things are, the agreement entered into between the plaintiff and the defendant as evidenced by the Facility Letter was for the defendant to provide a motor vehicle loan as applied for by the plaintiff. It was not a motor vehicle lease facility as is now alleged by the defendant. What the defendant tried to do was to change the motor vehicle loan facility to a motor vehicle lease facility whilst the contract had already been concluded. Obviously, that could not be done without the knowledge and consent of the plaintiff. The motor vehicle lease facility was fundamentally different from the vehicle and asset finance loan that the plaintiff had accepted. These two facilities could not be swapped just like that. There was need for the defendant to engage the plaintiff and explain to him fully their intention and the reasons therefor including the benefits and disadvantages to him and present to him an offer. Then it would have been up to him to accept such offer or not. In other words, this was a totally new and different contract which it would have been up to the plaintiff to accept to enter into it or not.

The defendant asserts that since the plaintiff signed the Master Lease Agreement he is bound by its terms and conditions and cannot resile from it. The defendant relies on the legal principle that in the absence of fraud or misrepresentation, a party who signs a document is normally bound by its contents whether or not he read them. See *L'Estrange v Graucob* [1934] 2 KB 394.

In *Engen Ltd - Malawi v Beatrice Kachingwe t/a Michiru Service Station* Commercial Case Number 260 of 2015 this Court summarized the law on this point as follows: -

> "The law as I understand it is that where parties have reduced their agreement in writing they are bound by the terms as contained in the written agreement. Neither of them may adduce evidence to show that his or her intention has been misstated in the contract document. This is commonly called the "parol evidence rule", see *Maria Chinzala v Total Malawi Ltd* Commercial Case Number 68 of 2011 (unreported). And a party signing a document is taken to have read and agreed with its contents, *L'Estrange v Graucob Ltd* [1934] 2 KB 394. Of course, there are exceptions to this general rule. These include, where a party's signature has been obtained through misrepresentation, whether fraudulently or otherwise, *Curtis v Chemical Cleaning & Dyeing Co*. [1951] 1 All E.R. 631, or where a person of full age and capacity executes or signs a document that is essentially, radically, fundamentally or very substantially different from the one they intended to execute or sign. In such a situation the plea of *non est factum* can be invoked, *Saunders v Anglia Building Society* [1971] A.C. 1004, *Commercial Bank of Malawi v Phiri* 11 MLR 4 and *Lloyds Bank Plc v Waterhouse* (1991) 10 Tr.L.R. 161. The law places the burden on the party seeking to disown his signature to prove that the document is not what he intended to sign. He must also show that he exercised care. And there is no burden on the opposite party to prove that he did not exercise care, *Saunders v Anglia Building Society* (supra)."

On the basis of this statement of the law, several issues can be raised. First, it can be said that on the evidence before the Court and the findings made hereinbefore (on the contract the parties entered into as evidenced by the Facility Letter), it is clear that the defendant is trying to disown and/or amend the contract it entered into with the plaintiff. The defendant is trying to adduce further evidence to prove that the Facility Letter does not constitute the parties' agreement on the Vehicle and Asset Finance Loan. The Facility Letter must be read in the light of the Master Lease Agreement which constitutes the parties' agreement. During cross examination the defendant's second witness, Thandaza Moyo, told the Court that the lease facility was quoted as a vehicle loan facility in the Facility Letter. When asked why the lease facility was so described he said "I may not know the specific reason but I assume because the letter was done by colleagues in the business banking department. They must have misquoted the term "loan" instead of putting the correct word, "the lease".

However, neither of the two authors of the Facility Letter were called to testify before the Court. Further, even the co-author of the letters varying the Facility Letter (the Variation Letters), Victoria Chanza, the defendant's first witness, never claimed that there was such a mistake in the description of the facility being granted. Therefore, it is clear from the evidence before the Court, that Mr Thandaza Moyo's assumption has no basis. It is mere conjecture. And as already stated, the defendant is trying to adduce oral evidence to amend the written agreement the parties entered into in respect of the Vehicle and Asset Finance Loan.

In my view, that cannot be allowed. The defendant having made the offer as per the Facility Letter, which offer was unconditionally accepted by the plaintiff, the agreement for the Vehicle and Asset Finance Loan was concluded. In addition to that, the evidence is clear that the parties went ahead to perform the contract. The Master Lease Agreement was given to the plaintiff to sign later in the course of their business interaction. As I have already said, the Master Lease Agreement was fundamentally different from the Vehicle and Asset Finance Loan agreement the parties entered into. Again, as earlier on stated, the defendant was not at liberty to change the substance and nature of the contract without the knowledge and consent of the plaintiff. Being a totally, fundamentally and radically different contract, the law would have expected the defendant to make an offer of that contract to the plaintiff so that the plaintiff should indicate his unequivocal acceptance thereof before there could be an agreement. There is no evidence before this Court that the defendant made an offer of a motor vehicle Lease Agreement to the plaintiff, which the plaintiff accepted.

As earlier stated in this judgment, the Facility Letter neither stated that the parties would be required to sign a Master Lease Agreement nor did it make any mention of it. As such, the Master Lease Agreement was a total stranger to the agreement in the Facility Letter. So, in as far as the defendant seeks to rely on the agreement as contained in the Facility Letter to sustain the Master Lease Agreement, it is untenable. In my judgment, the defendant is caught by the "parol evidence rule".

Further, at the risk of repeating myself, the Master Lease Agreement is fundamentally and radically different from the Vehicle and asset Finance loan agreement that the plaintiff signed with the defendant. The evidence shows that when the Master Lease Agreement was given to the plaintiff to sign, he believed it to be a document pertaining to the vehicle loan agreement. He did not think or know that it was a totally different

agreement all together. He had no reason to suspect that the defendant could at any point in the course of their relationship unilaterally change the nature of the facility he had obtained. He never asked for a lease of motor vehicles. He asked for a loan to buy motor vehicles which is what the defendant offered him as per the Facility Letter.

As earlier stated, in the circumstances of this matter, the defendant did not do enough as to hold the plaintiff to his signature. The defendant should have told him that they were changing or varying the type of facility they had agreed to offer to him. In the least, the defendant should have done a variation letter to that effect just as it did when altering the terms of the Facility Letter. I do not see why it did not do that if it was transparent and honest about it. May be if we had such a variation letter we would have been speaking differently. I emphasize, may be.

The defendant's witnesses told the Court that the defendant does not offer loans to customers to purchase motor vehicles. It only offers leases of motor vehicles. Assuming this is true, it leaves me with the impression that the defendant is a deceitful bank. What it means is that having seen that the defendant had actually offered the plaintiff a loan facility (which he had applied for) instead of a lease facility (which is what it offers), the defendant tried to change the loan into a lease by procuring, albeit clandestinely, the plaintiff's signature on the Master Lease Agreement. In my view, that was fraudulent, to say the least. I am inclined to accept the plaintiff's explanation that the defendant made him believe that he was signing a document pertaining to his motor vehicle loan facility. The defendant glossed over the import and effect of the Master Lease agreement. Thus, it is my judgment that, in the circumstances, the plea of *non est factum* can be invoked and the plaintiff ought not be held down to his signature. I reject the defendant's contention that the facility granted to the plaintiff was a lease and that the Master Lease Agreement is evidence of such agreement.

It has been contended by the defendant that since the Facility Letter stated that the Vehicle and Asset Finance Loan was subject to "terms and conditions set out in a separate agreement" it meant that the parties did not want this facility to be enforceable until a separate contract in relation to it had been drawn up and signed. The Master Lease Agreement is the separate contract which the parties herein drew and signed and ought to be enforced. The defendant has cited the cases of *May & Butcher v R* [1934] 2 K.B. 17 and *Courtney & Fairbairn v Tolaini* [1975] 1 WLR 297 in support of its submission. And on the authority of *Scammell (G) & Nephew Ltd v*

Ouston [1941] AC 251, the defendant submits that the Court must uphold the Master Lease Agreement as the agreement between the parties because in seeking to clarify and enforce agreements the law normally treads a middle line, avoiding wanton destruction of agreements on one side or the imaginative creation of bargains on the other.

In the Facility Letter the defendant inserted an Asterix (*) at the end of the phrase "Vehicle and Asset Finance Loan*". And below the table containing the facilities granted is another Asterix followed by the phrase "terms and conditions set out in a separate agreement". According to the defendant the message being conveyed was that the terms and conditions of the Vehicle and Asset Finance Loan were contained in a separate agreement to be signed later. And the separate agreement being referred to is the Master Lease Agreement which the parties executed subsequent to the Facility Letter.
In my judgment, the response to the defendant's contention lies in what I have already said in this judgment about how radical and fundamental the Master Lease Agreement was vis a vis the agreement as evidenced by the Facility Latter. In my view, the terms and conditions governing the Vehicle and Asset Finance loan agreement could not change the nature of the facility granted. Those terms and conditions could not transform the loan into a lease. In other words, the terms and conditions needed to conform with the spirit and intent of the agreement as concluded by the parties, that is, a Vehicle and Asset Finance Loan. By changing the Vehicle and Asset Finance Loan to a Lease Agreement, the terms and conditions offended the spirit and intent of the agreement. And in my considered view, that is untenable. As I have already stated above, if that were the case, there was need for the defendant to make a fresh offer of a Vehicle Lease Facility which the plaintiff would have been required to accept before a contract could be concluded. In this respect, it is clear that the Facility Letter and the Master Lease Agreement cannot co-exist because they are fundamentally contradictory.

In line with the general policy of upholding bargains, courts have tended to ignore meaningless clauses if they add nothing to an otherwise complete agreement. See *Nicolene Ltd v Simmonds* [1953] 1 QB 543. Thus, in the present case, I would ignore the Asterix and the explanatory note thereof and the Master Lease Agreement because they are offending the spirit and intent of the agreement in the Facility Letter. They are muddling up an agreement which is complete and already concluded.

Further, for what it is worth, I wish to agree with the plaintiff that according to section 5(1) of the Stamp Duties Act and the Schedule thereunder, Agreements for Hire Purchase, Lease or Letting are chargeable with stamp duty. Section 18 of the Stamp Duties Act provides that unless such a document is stamped it shall not be admissible as evidence. See *Hassam Kassam v Nur Mahomed Omar* [1923] 1 ALR Mal 173. There is no distinction on whether it is inadmissible in evidence as against third parties or as between the parties. Looking at the language of the section I would conclude that the document is inadmissible in both cases – as between the parties and as against third parties. In the present case, the Master Lease Agreement was not stamped as such it is inadmissible as evidence before this Court. Consequently, the defendant cannot rely on it as evidence to support its case before this Court that the facility it granted to the plaintiff was a lease and not a loan.

In the premises, to answer the question "who had the ownership of the motor vehicles under the loan/lease agreement and/or what were the parties' interests in the motor vehicles?", there is not much that can be said. Having purchased the motor vehicles on a loan (or loans) from the defendant, and the defendant's name having been endorsed on the motor vehicles' Registration Certificates as title holder, the position was as I have stated earlier in this judgment. That is, the plaintiff was the owner of the motor vehicles whilst the defendant was the title holder thereof. The defendant was to remain as such until the loan was fully repaid. In this respect, the observations I have made earlier on in this judgment about the law on title and ownership of motor vehicles and the rights and interests of the parties equally apply under this head.

Further, it means that the payments that the plaintiff made to the defendant on the motor vehicles were made towards the repayment of the Vehicle and Asset Finance Loan. They were not rentals as is claimed by the defendant. For all intents and purposes, they were monthly loan repayments. And as the evidence shows, the plaintiff was up to date on his repayments on the Vehicle and Asset Finance Loan.

However, again, as earlier stated, in terms of Clause 9 of the Facility Letter the default on the Short Term Loan automatically applied to the Vehicle and Asset Finance Loan. Clause 9 was a cross-default clause which provided that in the event of the plaintiff defaulting on repayment on the Short Term Loan facility or any other facilities granted to him, the full amount of the Short Term Loan facility and any other facilities accorded to the plaintiff together with interest would immediately become due and payable and also

that the defendant would be entitled to exercise all other remedies available to it under the Laws of Malawi.

Consequently, when the plaintiff defaulted on the Short Term Loan, the full amount outstanding on the Vehicle and Asset Finance Loan automatically became due and payable together with interest. In which case, as the judge found during the application for an injunction earlier on referred to, the defendant was entitled to deal with the motor vehicles as it deemed appropriate in order to safeguard its interests including to defray or mitigate its loses.

Therefore, I cannot fault the defendant for repossessing the motor vehicles and/or disposing of them. So, the plaintiff's prayer for an order that the security given (for both loans) be altered or released cannot succeed. Likewise, the plaintiff's claims for damages for wrongful repossession and loss of use of the motor vehicles cannot succeed. Both the evidence and the law lie in favour of the defendant. The claims must fail.

In *NBS Bank Ltd v Modern Business Management Ltd and Henry R Mwale* (supra) the Court made some observations in respect of disposal of charged real property. Though the sentiments were made in the context of section 71 (1) of the Registered Land Act, I find the principles expounded to be relevant and applicable to cases of repossession and disposal of property pledged as security for loans or other transactions. The analogy is relevant to the circumstances of the present case. The Court said: -

> "There is no convincing evidence before this Court that indeed the property was sold at an under value. In any case, I do not think that even if it were sold at a price below its market value, it would have meant that the sale was wrongful. It must be appreciated that there is no obligation on the part of the chargee to sell the charged property at the highest price obtainable on the market. It is important to remember that the only duty the law places on a chargee exercising his power of sale is to act in good faith and have regard to the interests of the chargor. (See section 71 (1) of the Registered Land Act). That duty, in my judgment, does not entail that the chargee must sell the property at its market value or higher, or that he must hold on to the property until he finds the highest price. The law does not place such a burden on the chargee because it recognises that it would be contrary to business prudence since the power is exercised following failure by the chargor to meet his contractual obligations, such as, the payment of the agreed instalments. In such instances, usually the chargee's interest is to try, as much as possible, to avoid

> or to minimise his loses due to the continued accumulation of arrears and the resultant increase in the debt. He thus seeks to recover his money as soon as is possible so that the money can be invested in loans to other borrowers or otherwise and earn returns. Inasmuch as this appears to be in the chargee's interests, it is also in the best interest of the chargor. It is good for the chargor that the loan should not grow to unmanageable proportions through the continued accumulation of arrears and interest. So, the sooner the property is disposed of and the proceeds applied towards the loan, the better it is for the chargor as well."

And it continued as follows: -

> "Thus, in my view, if the chargee accepts a fair price for the purchase of the property, he will have discharged his duty under section 71(1) of the Registered Land Act. What is a fair price is a matter of fact which will depend on the prevailing circumstances in each particular case. In the present case, the 2nd defendant has not shown that the price at which the property was sold was not fair in the circumstances prevailing at the time of sale. Therefore, I am unable to agree with the defendants that simply because the property may have been sold below its market value then it means that the sale of the property was unfair and or in disregard of the interests of the 2nd defendant."

In the present case, it being a loan transaction, and the plaintiff having paid money towards the repayment thereof, it is my judgment that there was need for the defendant to be more transparent in its disposal of the motor vehicles. The evidence shows that the defendant flighted notices in the daily newspapers calling for bids for the purchase of the repossessed motor vehicles. There is evidence from the plaintiff showing that the defendant advised him of the sale of three trailers and the balance outstanding on his facility. As things are, the plaintiff is not aware of how much was realized from the sale of each of the motor vehicles. That is unfortunate, to say the least.

The defendant was under a duty to act in good faith. This entailed, among other things, taking into consideration the interests of the plaintiff as the borrower and owner of the motor vehicles in addition to its own interests as the lender and title holder. In this respect, the defendant was under a duty to sell the motor vehicles at reasonable prices, and also to inform the plaintiff of how much had been realized from such sale. What could be said to be reasonable prices depends on the circumstances which were prevailing at the material time. As already said, the defendant has not

disclosed the prices at which the motor vehicles were sold. Thus, it is difficult for the plaintiff and indeed this Court to say whether or not the motor vehicles were sold at giveaway prices or unreasonable prices bearing in mind the market at the material time. In short, there is no basis for this Court to form an informed view on this point. All that can be said is that in the circumstances, the defendant owes the plaintiff an account of the proceeds from the sale of the motor vehicles and how they were applied.

Before I conclude, let me mention that the plaintiff seeks relief from the default and penalty interest that the defendant charged him in the course of their business relationship and is also being claimed by the defendant in this action. It is his case that such interest was, to use his words, "wrong and illegal and void and contrary to public policy". He wants the transactions to be reopened and reviewed in terms of the Loans Recovery Act. The contends that the transactions were harsh and unconscionable and were such that the court of equity would give relief and that the agreements were full of absurdities and ambiguities which made the plaintiff the loser all the time and the defendant winner in all circumstances. Further, the interest charged was excessive especially bearing in mind that the defendant had security and the motor vehicles were put on comprehensive insurance cover.

I wish to briefly deal with the issue of interest not so much in the context of the Loans Recovery Act but in the context of default or penalty interest which the defendant charged and is also claiming from the plaintiff. Fortunately, in recent years some judges of the Commercial Court have comprehensively discussed the issue. See *Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd* Commercial Cause No. 186 of 2015 (unreported) and *National Bank of Malawi Ltd v Lilongwe Gas Co Ltd* Commercial Case Number 165 of 2016 (unreported). So far I have not come across any pronouncement from the Supreme Court of Appeal on this important issue.

These cases discuss when the penalty or default interest is applicable and when it is not. I do not wish to repeat what was stated in those cases. But let me say that my views on the issue expressed in the latter case have not changed. As was stated in these cases, even in a case like the present where the parties agreed that default interest at the rate of 10% per annum above the defendant's Base Rate shall be payable if any amount payable under the Short Term Loan Facility is not paid when it falls due, there is still need for evidence to prove that such interest was/is justifiable in the circumstances of the case. It must be shown that the default or penalty

interest does not offend the rule against penalties. See *NBS Bank Ltd v Modern Business Management Ltd and Henry R Mwale* (supra).

In the present case, such justification is lacking. The defendant has not adduced any evidence on the point. All the defendant has done is to contend in the defence and counter claim that such interest was agreed upon and that it is payable and is continuing to accrue until the day the outstanding amount shall be paid in full. Therefore, it is difficult for the Court to agree with the defendant that such interest is justifiable. In the circumstances, I do not see how I can uphold the defendant's claim for default interest herein. It must fail.

What this means is that the defendant's calculation of the plaintiff's liability must be reworked out. The default interest that was applied and included in the calculations must be removed.

Lastly, but not least, let me come to the plaintiff's claim for damages for embarrassment, defamation and injurious falsehood. Having found that the plaintiff had defaulted on the Short Term Loan Facility which default crossed over to the Vehicle and Asset Finance Loan Facility and that in consequence thereof, the defendant as title holder of the motor vehicles pledged as security for the facilities was entitled to repossess and dispose of the motor vehicles, I find that there cannot be a question of defamation. The defendant was only exercising its rights under the business relationship it had with the plaintiff. I have not received any evidence which suggests that the defendant's officers conducted themselves in a manner which disparaged or was intended to disparage the plaintiff's character. If the plaintiff felt embarrassed by the fact that the motor vehicles were taken away from him, that in my view, was just a normal but very subjective human reaction to an otherwise lawful event. He has no cause for feeling aggrieved. He needs to appreciate that what the defendant did is what he agreed to when he entered into the business relationship with the defendant.

Having determined all the issues that the parties agreed must go to trial and having made the findings as contained herein it is my judgment that in disposing of the action the Court must make the following consequential orders: -

a) In order to determine the plaintiff's correct liability on the Short Term Loan Facility, the defendant must recalculate the amount excluding therefrom default or penalty interest which was applied and the plaintiff shall be liable to pay to the defendant such amount, if any, as may be found still outstanding;

b) In order to determine the correct position on the Vehicle and Asset Finance Loan, all the payments made by the plaintiff as contributions towards the purchase of the motor vehicles including all the payments which the defendant treated as rentals must be applied towards the repayment of the Loan;

c) The defendant must give an account of the sale and proceeds from the sale of each of the motor vehicles it repossessed from the plaintiff;

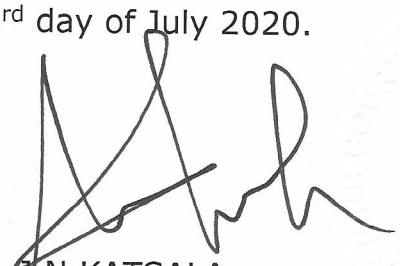
d) After the recalculations and due account are done as stated above, whichever party will be found owing the other shall be liable to that other in respect of the sum found due;

e) Subject to what I have stated herein, all other claims made by either party in their pleadings fail;

f) In the event that the parties fail to agree on any of these orders, either party will be at liberty to take out an appointment before the Registrar of this Court for determination and or assessment.

Bearing in mind the findings made herein it is my judgment that the justice of this matter demands that each party must bear its own costs of the action. There is no outright victor in these proceedings as such it is only fair and just that such an order be made. And I so order.

Pronounced at Blantyre this 3rd day of July 2020.



J N KATSALA
JUDGE