THE HIGH COURT
(COMMERCIAL DIVISION)
LIBRARY
P/BAG 22 BLANTYRE

REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 283 OF 2017

LUCAS PHEKANI

CLAIMANT

VERSUS

HIGHLANDS LEISURE LIMITED

DEFENDANT

CORAM: **HON. JUSTICE J. ALIDE**
Mr. Salimu, of Counsel for the Claimant
Mr. Majamanda, of Counsel for the Defendant
Ms. Kachimanga, Court Clerk

JUDGEMENT

The Claimant commenced these proceedings against the Defendant, a limited liability company incorporated and registered in the Republic of Malawi, claiming several heads of damages for breach of contract. The facts of the matter in brief are that on or about 14 March 2017, the Claimant and the Defendant entered into a Share Sale Agreement ("the Agreement") in which the Defendant agreed to purchase some 7,500 shares held by the Claimant in National Progressive Jackpot Limited, a company incorporated and registered in the Republic of Zambia. The agreed purchase price for the shares was in the sum of US$112,500 (One Hundred and Twelve Thousand Five Hundred United States Dollars). The signatories to the Agreement were the Claimant in his own behalf, and one John Loudon ("the deceased"), the Defendant's Managing Director and sole or majority shareholder at the material time.

It was a term of the Agreement that the Defendant was going to pay the Claimant a deposit towards the purchase price of the shares in the sum of US$30,000 (Thirty Thousand United Sates Dollars) on or before 31 March 2017, and the balance thereof to be paid by monthly instalments of US$3,000 (Three Thousand United States Dollars) spread over 27 months.

Apparently, the Defendant failed to pay the deposit on the due date, and the parties agreed that the payment be shifted to 31 May 2017. Unfortunately, the deceased passed away within the very month of May 2017 before payment of the deposit. Following his death, the Claimant approached the Defendant company seeking the implementation of the Agreement but to no avail. It is for this reason that the Claimant brought up this action against the Defendant for breach of the Agreement.

In his Statement of Case, the Claimant submitted that since the deceased signed the Agreement on behalf of the Defendant company, the refusal to honour its obligations in the Agreement amounted to breach of the same. The Claimant pleaded that the Defendant's breach of the Agreement had consequently derailed its investment in Zambia where the Claimant had been earmarked to hold an executive position in the company thereby earning some remuneration and perks. He submitted that as a result, he suffered and continues to suffer grave financial harm. Consequent upon the foregoing, the Claimant was claiming a variety of damages from the Defendant as follows:

(a) The US$30,000 (Thirty Thousand United States Dollars) being the unpaid deposit for the purchase of the shares;
(b) The balance of US$82,500 (Eighty-Two Thousand Five Hundred United States Dollars) that was supposed to have been paid to the Claimant in instalments but for the Defendants breach of the Agreement;
(c) Interest at the ruling bank lending rates on the amounts claimed;
(d) Perks related to the executive position offered and agreed upon in the Agreement;
(e) Interest on the perks in (d) above;
(f) Legal Practitioners collection costs on the amounts claimed; and
(g) Party and party costs.

In response, the Defendant company filed a defence denying the entire claim. It argued that it had nothing to do with the Agreement because the deceased signed the same without any approval or permission from its board of directors. The Defendant further argued that, in any case, both the Claimant and the Defendant failed to fulfil the conditions precedents contained in the Agreement thus rendering it invalid and ineffectual. The Defendant further argued that the Agreement had specifically provided for arbitration as a way of resolving any dispute under the same and contended that this Court did not have any jurisdiction over the matter. All summed up, the Defendant submitted that the Claimant's action did not have any merit as alleged by the Claimant or at all.

Having looked at the facts and the submissions herein, the issues before this Court are as follows:

(a) Whether or not this court has jurisdiction to hear this matter;
(b) Whether or not the Agreement bound the Defendant company;
(c) Whether or not the Agreement was effective, valid, and enforceable; and

(d) Whether or not the Claimant is entitled to any of the damages or reliefs being sought in the claim.

In support of his claim, the Claimant was his own sole witness in the matter. As part of the evidence, he tendered his witness statement with one attachment; the Agreement, which was marked as exhibit "LP1". The witness statement and exhibit "LP1" were adopted as part of the Claimant's evidence.

It was the Claimant's testimony that he entered into discussions with the deceased after he had expressed the Defendant's interest to acquire the Claimant's 7,500 fully paid-up shares in the said National Progressive Jackpot Limited. The shares represented 75% of the company's share capital. The discussions were a success. The Claimant and the deceased agreed to proceed with the transaction at a consideration of US$112,500 (One Hundred and Twelve Thousand Five Hundred United States Dollars). A written Agreement was signed by the Claimant and the deceased, as a duly authorised representative of the Defendant company. The Claimant highlighted that in terms of clause 7.3 of the Agreement, he was supposed to assume an executive position within the Defendant company's operations in Zambia.

It was the Claimant's further testimony that after the death of the deceased, he made contacts with the Defendant company in a bid to have the Agreement implemented. However, despite several attempts, there had been no success. Accordingly, he brought up the present action to recover the pleaded damages for the Defendant's breach of the Agreement.

In cross examination, the Claimant confirmed that at the time of the signing of the Agreement, he was one of the shareholders and director of National Progressive Jackpot Limited along with three others. He admitted that the Agreement contained conditions precedents that had to be fulfilled before the terms of the Agreement became effective and binding. He admitted that the conditions precedents included a requirement that the board of directors of National Progressive Jackpot Limited should pass a resolution approving the sale of his shares to the Defendant, and a resolution authorising him to enter into the Agreement. The Claimant also confirmed that the Agreement required the Defendant's shareholders and directors to pass a resolution approving the purchase of the shares stated in the Agreement. The Claimant confirmed that none of such resolutions had been procured by either party.

In further cross examination, the Claimant claimed that he no longer held the 7,500 shares because there had been a transfer to the Defendant. However, he could not produce any document evidencing such a transfer. He confirmed that, surely, there could have been a document evidencing the transfer and registration of the shares at the Zambia company registration offices if the transfer had gone through. He then alleged that the deceased, John Loudon, had all the registration documents. Upon further cross examination, the Claimant changed his testimony and admitted that there had been no change in the shareholding of National Progressive Jackpot Limited and that he still held the shares.

In re-examination the Claimant stated that he had sold his 7,500 shares to the Defendant but that the registration was not completed. He then argued that the failure to register the transfer of the shares did not reverse the sale. That marked the end of the Claimant's testimony and indeed his case.

The Defendant called one witness by the name Louredana Zvic (DW1). As part of her evidence, she filed and tendered a witness statement with an attached document that was exhibited and marked as "LZ1". She also filed and tendered a supplementary witness statement with several documents which were exhibited and marked as "LZ2" to "LZ9". The witness statement and the attendant exhibit, as well as the supplementary witness statement and the attendant exhibits were adopted as part of her evidence.

In her testimony, she submitted that at the time the Agreement was signed by the Claimant and the deceased, the Defendant had three directors namely; the deceased, Tony Pomfret; and herself. To that effect, she tendered exhibit "LZ9", the Defendant company's Annual Return as of June 2016. She further submitted that the deceased was at that point the Defendant's Managing Director and sole shareholder.

It was her testimony that although the deceased was the Defendant's Managing Director and sole shareholder, he did not have any express or implied authority or approval from the Defendant's board of directors to enter into the Agreement on behalf of the Defendant company. She submitted that this was a very big investment and commitment on the part of the Defendant company that required authorization and approval from the board of directors. She further questioned the effectiveness of the Agreement and argued that it was rendered ineffective and invalid because both parties failed to fulfil, or waive, the conditions precedents contained in the Agreement.

During cross examination, she denied that exhibit "LZ9" was fraudulent after the Claimant who declared it the same. The Claimant went on and "suggested" to the Court that the said document should not be allowed or relied upon by the Defendant because it was not listed as part of the Defendant's List of Documents.

In further cross examination, DW1 admitted that she had not brought any evidence to show that she was a director in the Defendant company on the date of signing of the Agreement. She further conceded that she was aware of the deceased's interest in purchasing shares from the Claimant following a personal conversation that she had with him. She stated however that this did not materialise because it was not brought before the board for approval. She further argued that though she did not bring any evidence to show that there was no such authorisation or approval by the Defendant company, the very fact that none of the parties had tendered such a board resolution in the proceedings meant that there was none. She insisted that the Defendant's decisions were always made through board resolutions and exhibited "LZ8(i)" and "LZ8(v)" as examples of such resolutions.

In re-examination, she submitted that although she had not brought any specific proof to show that on the material date of signing of the agreement she was a director, exhibit "LZ9" showed that she had become a director of the company in 2015. She further stated that after the passing on of John Loudon, she became the Defendant's Managing Director, a position that she was still holding. She stressed that there had never been any board approval authorising the deceased to enter into the Agreement with the Claimant on behalf of the company. This marked the end of her testimony and indeed, the Defendant's case.

This being a civil matter, the burden of proof lies with the party who alleges a particular fact i.e., he who alleges or asserts a matter of fact must prove it. In the present case, it is the Claimant who has the task of proving the facts that he has levelled against the Defendant. The standard of proof required in the circumstances is one on a balance of probabilities. Denning J, as then he was in *Miller v. Ministry of Pensions* [1947] 2 All ER 372 stated as follows:

> "That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in criminal cases. If the evidence is such that a tribunal can say 'we think it is more probable than not' the burden is discharged, but if the probabilities are equal, it is not."

This position has been affirmed in local cases like *Commercial Bank of Malawi v. Mhango* [2002-2003] MLR 43 SCA and several others. In *Kentam Products v Kenneth Mweso,* Civil Cause No. 68 of 2013, High Court, Mzuzu District Registry (unreported) Justice Madise, as then he was, stated as follows:

> "The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on a balance of probabilities. The principal is that he who invokes the aid of the law should be first to prove his case as in the nature of things, a negative is more difficult to establish than a positive. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than not must carry the day."

The above entails that, to succeed in this matter, the Claimant bears the burden to prove his assertions against the Defendant as contained in the Statement of Case on a balance of probabilities. It is not for the Defendant to prove otherwise.

On jurisdiction, it is always important for the Court to ensure that it has the same before it can proceed to hear and determine any matter, more so where parties agree that their disputes are going to be resolved through arbitration. It is important for the Court to firstly satisfy itself that the parties have surrendered themselves to the jurisdiction to the Court before proceeding to hear and determine the matter.

Section 6(1) of the Arbitration Act (Cap 6:03) of the Laws of Malawi provides as follows:

> "if any party to an arbitration agreement, or any person claiming through under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party

to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

It is therefore settled in the above provision that where a party to an agreement with an arbitration clause wishes to rely on the clause to challenge the jurisdiction of the court or to make an application to stay the proceedings pending reference of a matter to arbitration, such party must show that it never filed any further process in the proceedings after entering an appearance. See also *Admarc Limited v. Alliance Capital Limited*, Commercial Case No. 233 of 2021 (unreported).

In terms of agreements generally, it is a general principle of common law that parties are free to agree on whatever terms they want to govern their contractual relationships. In the case of a written agreement, it was held in *Maria Chinzala v. Total Malawi* Ltd Commercial Case No. 8 of 2011 (Unreported) that where parties have reduced their agreement in writing, they are bound by the terms as contained in the written agreement. Further, it is trite that a party signing any agreement is taken to have read and agreed with all its provisions.

Where an agreement for sale has a condition precedent or conditions precedents to its validity or effectiveness, it is important that parties must fulfil such conditions precedents before the agreement can be rendered completed. See *Aberfoyle Plantations Ltd v. Chang* [1959]3 All ET at 914. The House of Lords in the case of *Total Gas Marketing Limited v. ARCO British Limited and Others* [1998] UKHL 22, Lord Slynn said as follows:

"If the provision in an agreement is of fundamental importance then the result either of failure to perform it (if it is promissory) or of the event not happening or the act not being done (if it is a contingent condition or a condition subsequent) may be that the contract either never comes into being or terminates. This may be so whether the parties expressly say so or not."

For agreements that are concluded on behalf of corporate entities, the English case of *Royal British Bank v Turquand* (1856) 6 EL&BL 327, (1843-1860) All E.R. 435, laid a rule popularly known as the Rule in Turquand's Case. The rule is to the effect that people who transact with companies are entitled to assume that all the internal company rules have been complied with even if they are not. This rule was endorsed by the House of Lords in *Mahony v. East Holyford Mining Co.* (1874-75) LR 7 HL 869, and subsequently came to be known as the "indoor management rule". On pages 893 to 894 Lord Hatherley stated as follows:

"when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal

management of the company. They are entitled to presume that of which only they can have knowledge, namely the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed."

The above rule has been applied by Malawian courts such as in the case of *National Bank of Malawi Limited v. Dairiboard Malawi Limited* 1 [2005] MLR (Com) 45 in which the court stated that:

> "where there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them externally, are not bound to be affected by any irregularities which may take place in the internal management of the company."

This principle has since been coded in section 40 of the Companies Act 2013 (Cap 46:03 of the Laws of Malawi).

It is important to state though that the Rule in the Turquand's Case or the "indoor management rule" will not apply in suspicious circumstances that may put an outsider to notice, or suspicion, so at to inquire into the actual authority of a corporate officer.

On damages, it is trite that the main aim of awarding damages for breach of contract is to put the wronged party or victim in the same position that they would have been but for the breach. See *H.H. Chikaoneka t/a Madalitso Clothing Factory vs. Indefund Ltd* MSCA Civil Appeal No. 22 of 2021; and *Robinson v. Harman* (1848)1 Ex.850, 865. Damages are not there to provide a gratuitous benefit to an aggrieved party.

Having heard the parties in this matter, and having considered the evidence before me, the skeletal arguments and submissions filed by the respective parties, and considered the law, I am compelled to first deal with the peripheral issue raised by the Claimant during cross examination of DW1. The Claimant "suggested" to the Court that exhibit "LZ9", a copy of the Defendant's Annual Return for 1996, should not be allowed or relied upon by the Defendant in Court because it was fraudulent and was not listed in the Defendant's List of Documents.

I will not belabour the issue. I have stated that the Claimant "suggested" because he did not formally apply to the Court for the same. I am very certain that the Claimant exactly knew the perils and hazards of so applying. It is clear that the Claimant's "suggestion" only came during cross-examination after the documents that were brought by DW1 had already been tendered and adopted in evidence in chief. In other words, these had already been accepted by the Court. It was therefore too late for the Claimant to proceed and suggest otherwise. The Claimant should have objected to the tendering of the document, and indeed the rest of the documents that were served with the supplementary witness statement, as a preliminary issue before the Defendant's evidence was presented and accepted by the Court.

Let me state further that even if the objection came timely, I would have exercised my discretion under Order 2 Rule 3 of the Rules and still allowed the document to be tendered as evidence in court because the Claimant had these documents for over two months before the date of the trial but did nothing. The Claimant had ample notice of the same and could have argued about its authenticity in a more professional manner rather than simply alleging that it was fraudulent without any foundation. The fact that these were not listed in the List of Documents does not raise any issue because it is clear that the Claimant had these documents in his hands for over two months before the date of the trial and had more than enough time to look at them. In my mind there was no prejudice that the Claimant could have suffered in the foregoing. There is no real issue here. It is no surprise that the Claimant did not lay any arguments on this peripheral issue anywhere in his final submissions. That notwithstanding, I felt compelled to address this issue for posterity.

On whether or not this court has jurisdiction to hear this matter, the Defendant based its defence on the arbitration clause that was part of the Agreement. It was provided that if there was any dispute in respect the matter, the same was to be referred to arbitration. Section 6 of the Arbitration Act is very clear that a party wishing to rely on an arbitration clause must not take any other steps after entering an appearance. Where a party proceeds and files a defence they immediately lose their right to proceed to arbitration and submit themselves to the jurisdiction of the court. See *Admarc v. Alliance Capital Limited* (supra).

In the present matter, the Defendant proceeded and filed a defence after entering an appearance. It was at this point that the Defendant lost the right to have the matter proceed for arbitration and submitted itself to the jurisdiction of this Court. In that regard, the Defendant has no merit in questioning the jurisdiction of this Court. It is my finding therefore that this Court has jurisdiction to hear and determine this matter.

On the Agreement in question, it is not in dispute that the Claimant and the Defendant entered into an agreement for the purchase of 7,500 shares which the Claimant held in National Progressive Jackpot Limited. The Agreement was signed by Claimant on one hand, and the deceased on the other. The deceased, then the Defendant's Managing Director and sole shareholder, signed the same as "duly authorised" on behalf of the Defendant. In my view the deceased's actions caught the Defendant company within the ambit of *Royal British Bank v Turquand* (supra) i.e., the Rule in Turquand's Case. Surely, the Claimant, just like any reasonable person would, had very good reason to believe that the deceased had full authority, in accordance with the Defendant's internal rules, to enter into discussions with the Claimant, and then conclude and sign the Agreement on behalf of the Defendant.

The Defendant has tried to apply the exception to the rule by citing *Brooks Ltd v. Claude Neone General Advertising Ltd* [1931] 2 DLR 743, 1932 Carswellont 126 in which Lord Justice Garrow on paragraph 10, stated as follows:

> "I am inclined to agree with the argument of counsel for the defendant company…that that there was something so out of the ordinary in one company undertaking to purchase the entire

outstanding stock of another as to put the plaintiffs upon inquiry to ascertain whether the person or persons making the contract had any authority in fact to make it."

The Defendant argued that the fact that the deceased was signing an agreement for the purchase of 7,500 shares from the Claimant, which was about 75% of the National Progressive Jackpot Limited, should have put the Claimant on notice, and he should have proceeded to enquire as to whether he had prior authority from the Defendant. I choose to differ on the ground that the deceased was not just a mere officer of the Defendant company. He was the Defendant's Managing Director and the sole or majority shareholder. Certainly, the Claimant, and indeed nobody outside the establishment of the Defendant company, would, in his right bearings, doubt or question the authority of an individual in such capacity to conclude and sign such an agreement on behalf of the Defendant. Truly, the deceased was at the pinnacle of the Defendant company's corporate structure in terms of both ownership and management. In my view, the exception to Rule in Turquand's Case is not applicable in this regard.

From the foregoing, it is my finding that the Agreement between the Claimant and the Defendant company was at the material time valid and enforceable. The fact that there was no resolution by the board of directors authorising him to sign the Agreement was non-consequential in this regard.

The next issue that I must consider is whether the Agreement is still effective, valid and/or enforceable between the Claimant and the Defendant.

Clause 2.1 of the Agreement states as follows:

"2.1 The provisions of this Agreement (other than the provisions of 1, this 2, and 6, which shall nevertheless apply from the Signature Date) are subject to the fulfilment or waiver, as the case may be, of the Conditions Precedent that, by no later than 31st March 2017 or such later date or dates as may be agreed by the Parties in writing –

2.1.1 The Purchaser will have entered into a shareholder's agreement, at heads of terms level, with the Seller in which the Purchaser will undertake among others:

2.1.1.1 To appoint, and retain, the Seller as director of the Company (subject only to disqualification provisions as are mandatory under the Companies Act, on such terms that will, include service contract satisfactory to the Seller;

2.1.1.2 The Purchaser agrees to maintain the operation of Wide Area Progressive jackpot;

2.1.1.3 The parties agree to non-compete provisions, including that any online or mobile package to be introduced by the Purchaser will be through the Company;

2.1.2 the board of directors of the Company shall have passed resolutions approving the sale of shares anticipated in this Agreement and authorising the Seller's entry into this Agreement;

2.1.3 the shareholders and directors of Highlands Leisure Limited shall have passed resolutions approving the sale of shares anticipated in this Agreement."

It was further provided under clause 2.2 that the parties were going to use their best endeavours to procure the fulfilment of the above preconditions precedents by the specified date, and to cooperate with one another to ensure that information that was required for the purposes of seeking any approval was obtained.

The consequences of the parties' failure to fulfil the conditions precedents were clearly laid out under clause 2.3 of the Agreement as follows:

> "If the Conditions Precedent shall not have been fulfilled or waived, as the case may be, by the date referred to in 2.1 or such later date or dates as the Parties may agree in writing, this Agreement (other than the provisions of 1, this 2, and 6 which shall remain in full force and effect and by which the Parties shall continue to be bound) shall have no effect and neither of the Parties shall then have any claims against the other party as result of or in connection with any such non-fulfilment or non-waiver (other than a claim for breach by a Party of any of its obligations under 2.2), or for anything done or arising in terms of this Agreement save in respect of a breach of the provisions of 1, this 2 and 6."

The evidence before me is very clear that none of these conditions precedents under part 2 of the Agreement was waived or fulfilled by either party by the agreed date or at all. For the avoidance of doubt, there was no Shareholder's Agreement that was concluded between the Claimant and the Defendant as provided under clause 2.1.1; there was no resolution by the board of directors of National Progressive Jackpot Limited approving the sale of shares and authorising the Claimant to enter into the Agreement as provided under clause 2.1.2; and there was no resolution from the Defendant's shareholders and directors approving the sale of shares anticipated in the agreement as provided under clause 2.1.3. Above all, apart from the failure of both parties to fulfil the conditions precedents, it is very clear from the evidence before me that there was no transfer of shares between the Clai ant and the Defendant. The Claimant happily retains the same and is business as usual.

Looking at clause 2.1 above, it is very clear that the effectiveness, validity, and enforceability of the Agreement hinged on the fulfilment of these conditions precedent. It is trite that where an agreement has conditions precedent for its validity or effectiveness, parties must fulfil such conditions precedent before the agreement can be rendered completed. See *Aberfoyle Plantations Ltd v. Chang* (supra) and *Total Gas Marketing Limited v. ARCO British Limited and Others* (supra). The Agreement itself provides the consequences of non-fulfilment of the conditions precedents twofold i.e., the agreement shall have no effect, except for provisions under clauses 1, 2 and 6; and that neither party shall have any claim against the other for non-fulfilment of the conditions precedents.

I have no reason to believe that the parties intended exactly what had been clearly stipulated in the Agreement. It is very clear. Accordingly, it is my finding that the Agreement was rendered

ineffective on 31 March 2017 due to the failure of both parties to fulfil the conditions precedents. In other words, the Agreement was not completed, and as it stands, terminated. There is therefore nothing worth enforcing by this Court. Accordingly, the Claimant has completely failed to prove his case against the Defendant.

Having found that the Agreement was not completed, hence not effectual and not enforceable, the Claimant is not entitled to any of the damages or reliefs being sought in the claim. Apart from that, let me say that in my view, the Claimant did not suffer any loss or damage worth any compensation at all. He did not himself do the needful as provided in the Agreement. The shares were not transferred to the Defendant. He still happily retains them in the Zambian company, and ordinarily still earns dividends. Surely, he cannot blow hot and cold, or eat his cake and have it, at the same time. Accordingly, the matter is dismissed in its totality.

In respect of party and party costs, these are at the discretion of the Court. However, it is general practice that they follow the event. Accordingly, I award the same to the Defendants.

Dated this 15th day of February 2024

JABBAR ALIDE
JUDGE