MALAWI GOVERNMENT

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

LILONGWE REGISTRY

COMMERCIAL CAUSE NO 42 OF 2017

BETWEEN

ETHEL KANALO..PLAINTIFF

AND

THE REGISTERED TRUSTEES OF SKYWAY UNIVERSITY..DEFENDANT

CORAM

L. MTCHERA, ASSISTANT REGISTRAR

B. PHIRI, OF COUNSEL FOR THE PLAINTIFF

G. KHONYONGWA, OF COUNSEL FOR THE DEFENDANT

E. NDHLAZI, COURT CLERK

ORDER ON ASSESSMENT

Introduction

The plaintiff commenced the proceedings against the defendant claiming both special damages and general damages. The special damages relate to loss of K250,000 in transport and upkeep and K15,000 being a refund of registration fees, while in the general damages the plaintiff seeks damages for breach of

contract, damages for fraudulent misrepresentation, damages for negligent misrepresentation, damages for breach of fiduciary duties and costs of the action.

Brief facts and evidence

The brief facts of the case are that the plaintiff enrolled with the defendant for a course in Shipping and Logistics Management. She paid K55,000 for registration fees and tuition fees. However despite availing herself for tuition for a period of four months tuition was only provided for two weeks. Later the defendant communicated to the plaintiff that the University could no longer offer the course because the Lecturer had been transferred to their Mzuzu Campus. Therefore those who wanted to continue pursuing the course should relocate to Mzuzu. This was communicated in June last year but she only got a refund of tuition fees in September of the same year.

Issue for determination

The only issue for determination in this case is how much should be paid as compensation to the plaintiff on the different heads of claims.

Law and discussion

The cardinal principle in awarding damages is '*restitutio in integrum*'. This means that the law will endeavour, in so far as money can do, to place the injured party in a position he would have been had it not been for the wrong he is being compensated for – see **Halsbury's Laws of England 3rd Ed. Vol II p. 233 para 400**. Thus the rule presupposes that prior to assessment the injured party has provided proof and that what remains is the amount or value of the damages. –see **Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd [1992] 15 MLR 370**.

It is imperative to note, therefore, that the law distinguishes general damages from special damages. Whereas general damages are such as the law will presume to be the direct or probable consequence of the action complained of, special damages on the other hand are such as the law will not infer from the nature of the course – see **Stros Bucks Aktie Bolag v Hutchinson (1905) AC 515**. Thus special damages must be specifically pleaded and must be strictly proved – see **Govat v Manica Freight Services (Mal) Limited [1993] (2) MLR 521**. That is why a party who claims special damages is called upon to adduce evidence or facts which give satisfactory proof of the actual loss he/she

alleges to have suffered, failing which special damages are not awarded –see **Mathew J Msusa and Another v Royal and Sun Alliance Insurance Company Plc and Another [2009] MLR 337; Wood Industries Corporation Ltd v Malawi Railways Ltd [1991] 14 MLR 516.** Thus in assessing damages due and payable the court ought to have regard to the pleadings since issues for determination are regulated by the pleadings- see **Venetian Blind Specialists Ltd v Apex Holdings Ltd [2009] MLR 422**. Hence it is the duty of each party to clearly indicate in their pleadings the kind of damages they are seeking from the court and to prove the same.

A perusal of the pleadings by the plaintiff shows that the only special damages pleaded are K15,000 and K250,000 in respect of registration fees and transport and upkeep respectively. There is no claim in relation to accommodation expenses in the pleadings. Even the witness statement is silent on this. However this only came up in the submissions which were filed with the court on 29th May 2017. Therefore going by the rules of pleadings the claim for K450,000 for accommodation cannot be sustained as this was not pleaded by the plaintiff.

We are in total agreement with **Sir Jack Jacobs in "The Present Importance of Pleadings" page 174** that: "*…..for the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment made…*". It is, therefore, our considered view that the plaintiff had ample time within which she could effect an amendment to her pleadings, but she never did. Therefore she cannot be allowed to raise a different or fresh claim at the time of filing the submissions. In any case even if the court were to allow the claim by way of amendment it would be required of her to produce evidence in the form of Tenancy Agreement between her and the landlord. Our considered view is that accommodation with rentals of that magnitude would require at least a formal tenancy agreement. Therefore this court does not believe that the same plaintiff who could not pay her tuition fees of K61,000 in full could afford to pay accommodation for K150,000 per months- see the **Knight Frank case MSCA Civil Appeal 38 OF 2000**. However with regard to K250,000 spent on transport and upkeep, the court is of the view that that is a reasonable expense to cover the period in question. It is therefore allowed.

It has been noted from the evidence of the plaintiff that the defendant refunded her the tuition fees she had paid on enrolment into the course upon realising that the university could not continue to offer the course. She, however, said the

K15,000 for registration was not refunded as the colleges had indicated that it was non-refundable. The plaintiff further conceded in cross-examination that the course she enrolled for is also offered by other institutions. Thus it is our view that the plaintiff could have mitigated her loss by enrolling with other institutions which offer the same course. That is the reason the defendant refunded the tuition fees and advised the students that those who still wanted to pursue the course could relocate to Mzuzu. The other available option was to enrol with other institutions as a last resort. Perhaps what the plaintiff should have insisted on was the refund of the registration fees since the defendant had failed to continue offering the course.

As regards where the plaintiff could have been had the defendant continued to offer the course, the court does not want to speculate. It is one thing to enrol or register for a course and yet another to qualify for the award of the Certificate at the end of the course. Thus there was not guarantee that the plaintiff would qualify for the award of the Certificate in Shipping and Logistics Management. And even if she had qualified for the award of the said Certificate there was no guarantee that she get employment soon after acquiring the qualification. Cases abound of school leavers who have been unemployed for years after leaving school with good papers.

Admittedly the defendant was in breach of the agreement when they could not continue to offer the course to the students. However the only damages which the plaintiff is entitled to resulting from the breach are those which are not too remote from the consequences of the breach. In other words the plaintiff is only entitled to damages or loss which arises naturally from the breach or those which must have been within the reasonable contemplation of both parties at the time the contract was made – **Hadley v Baxandale [1854] EWHC J70, (1854) 9 Ex 341, 156 Eng Rep 145 (1854)** . Thus according to this case the test of remoteness in contract law is contemplation. Damages are available for loss which:

> naturally arises from the breach according to the usual course of things, or,
>
> is within the reasonable contemplation of the parties at the time of contracting as the probable result of the breach (this may be, for example, because special circumstances have been communicated at the time of

contracting and therefore can be said to be within their reasonable contemplation).

Thus it is our considered view that the plaintiff cannot claim damages for loss of marriage as this could not be said to have been within the reasonable contemplation of the defendant when the plaintiff enrolled for the course. And there is no evidence on record to show that the defendant was informed about the plaintiff's plans to get married on completion of the course.

With regard to damages for a convenience we feel these are recoverable. Our view is that the plaintiff must have had at the back of her mind the time frame within which she could complete the course she had enrolled in. Thus the discontinuous of the course by the defendant at its Lilongwe campus was an inconvenience to students who had enrolled for the course. This was further compounded by the fact that the students got the refunds of their tuition fees late. It is on record that the defendant communicated to the students about the discontinuous of the course at their Lilongwe campus in the month of June 2016 but the students only got their refunds in September of the same year. This must have greatly inconvenienced the plaintiff who thought could have finished the course as planned. Therefore the plaintiff is awarded the sum of K150,000 as damaged for inconvenience.

In summary the plaintiff is awarded k250,000 for transport and upkeep,K15,000 which she paid as registration fees since the defendant discontinued the course before the students who had enrolled for the same sat for the final examinations; K150,000 as damages for inconvenience. The plaintiff is also awarded K300,000 as damages for breach of contract.

With regard to costs these are in the discretion of the court. They normally follow the event. Therefore the plaintiff is awarded the costs of the action.

Delivered in Chambers this 23rd day of June ,2017

L. Mtchera

Assistant Registrar