

**IN THE HIGH COURT OF MALAWI
(COMMERCIAL DIVISION)**

**LILONGWE REGISTRY
COMMERCIAL CASE NO. 212 OF 2016**

BETWEEN:

STEEL WORKS (2002) LIMITED PLAINTIFF

AND

YANG JIE INDUSTRIAL CO. LTD DEFENDANT

Coram: Hon. Justice Mtalimanja

Mr. Ian Malera, Counsel for the Plaintiff

Mr. Edward Chagalamuka, Counsel for the Defendant

Mr. E. Ndhrazi, Court Clerk

**RULING ON SUMMONS ON APPLICATION FOR AN ORDER FOR
INTERIM PAYMENT**

1. This is an application by the plaintiff, under O.17 of the High Court (Commercial Division) Rules, 2007 (hereinafter referred to as the "Rules"), for an Order of interim payment. The plaintiff is seeking an order that the money in the Defendant's bank Account maintained at Ecobank, Kanengo Branch should be paid to the plaintiff to cover rentals of K13, 929, 515 that were due to at the time the freezing Order was made or so much thereof as may be possible.

Background

2. The Application is supported by an affidavit sworn by Mr. Vasco Alves, Managing Director of the plaintiff. Of relevance to the claim for rentals Mr. Alves deposed as follows: On 31st May, 2017, the Court made an Order restraining the defendant from using or transferring funds in its account maintained at the Ecobank Kanengo Branch

until a further order of the Court. Following the said Order, the defendant has not carried out repair works on the premises as ordered by the Court nor has it paid any sums of money towards settlement of outstanding rentals. The defendant has continued to keep part of its plant and machinery on the said premises thereby making it impossible for the plaintiff to rent out the property to third parties. Due to the state in which the premises are and the presence of the defendant's part of its plant and machinery, the plaintiff has been unable to rent out the premises and cannot even operate from the said premises.

3. As the months continue to go without the premises being repaired and no rentals being paid, the plaintiff continues to suffer loss as it cannot generate income from the said premises and this was the plaintiff's major source of income. The plaintiff continues to suffer while the defendant, who is in no hurry to repair the premises and pay outstanding rentals, continues to operate from Area 51 and make sales and is not affected in its daily operations by the closure of the Area 28 factory.
4. The defendant filed an affidavit in opposition to this Application, however the same was struck off for being served on the plaintiff out of time.

The law

5. The Summons on this Application were filed under O.17 of the Rules, prior to the commencement of the Courts (High Court) (Civil Procedure Rules), 2017 (hereinafter referred to as the "CPR"). As per the transitional provisions of the CPR, this Application will be determined under the said O.17 of the Rules,
6. Order 17, r. 1(1)(j) of the Rules allows the court to order interim payment, as an interim remedy, for payment by a defendant on account of any damages, debt or other sum, except costs, which the court may hold the defendant liable to pay. However in terms of O.17, r.7 of the Rules, certain conditions must be satisfied and taken into account before an interim payment can be ordered. O.17, r.7 provides as follows:

- (1) The Court may make an order for an interim payment only if-
 - (a) a defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to a plaintiff;
 - (b) the plaintiff has obtained judgment against the defendant for damages to be assessed or for a sum on money (other than costs) to be assessed;
 - (c) it is satisfied that, if the claim went to trial, the plaintiff would obtain judgment for a substantial amount of money (other than costs) to be assessed; or
 - (d) the following conditions are satisfied-
 - (i) the plaintiff is seeking an order for possession of land (whether or not any other order is also sought); and
 - (ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the plaintiff a sum of money for the defendant's occupation and use of the land while the claim for possession was pending.
- (2) The court shall not order an interim payment of more than the admitted amount at one third (1/3) of the likely amount of final judgment.
- (3) The Court shall take into account-
 - (a) contributory blame; and
 - (b) any relevant set-off or counter or counterclaim.

7. In order for the court to grant an order of interim payment, the conditions set forth in O.17, r.7 (1) must be satisfied. The conditions are set forth in the provision disjunctively, implying that an order for an interim payment may be granted upon satisfaction of **any** of the conditions. Where the court is satisfied that any of the specified conditions has been satisfied, then, before granting the order, it must also take into account the contributory blame and any relevant set-off and counterclaim. Further, the court can only order payment of not more than one third (1/3) of the likely amount of the final judgment.

Determination

8. The plaintiff's case is that the defendant owes it outstanding rentals and also left the premises in issue in un-tenantable conditions such that the same cannot be let out to third parties. Since the defendant is yet to maintain the premises and remove its machinery therefrom, an order should be made for interim payment of rentals in the sum of K13, 929, 515.05, so the argument goes. On the basis of O.17, r. 7 (2) and (3), the defendant contends that before granting the order, the Court should consider the nature of the defendant's counter claim, contributory blame and the fact that there is no admission of liability for outstanding rentals by the defendant.
9. As indicated above, an order for interim payment may only be granted upon satisfaction of any of the conditions set out in O.17, r.7 (1) of the Rules. An examination of the court record shows that the claim for outstanding rentals is one of the main issues in contest between the parties. In the Statement of Claim, the plaintiff claims the sum of K3, 512, 911.88 being rent for the period September to November, 2016. In its Defence, the defendant specifically denies that the plaintiff is entitled to rent for the period of September to November. There is thus no admission of liability for the claim for outstanding rentals in the defendant's pleadings.
10. Beyond the pleadings, the issue of liability for outstanding rentals has featured highly in the history of this matter this far. In Skeletal Arguments filed on 31st January, 2017 by the plaintiff in support of their application for an Order of interlocutory freezing injunction (which was duly granted), the plaintiff argued that the question whether the defendant was supposed to pay rentals and surrender the premises in good and tenantable condition was a serious issue to be tried between the parties.
11. By Order of the Court made on 11th May, 2017 in the presence of both parties, the parties agreed, *inter alia*, that the plaintiff should write the defendant within 14 days communicating the claim for rentals and ancillary claims. Subsequently, in an attempt to resolve the matter amicably, the parties provisionally agreed, *inter alia*, that upon the defendant paying 3 months rentals, the freezing injunction over the defendant's

bank account will be vacated. This agreement was resiled from by both parties in short order, citing lack of good faith and unwillingness to perform the agreed terms. No agreement having been reached by the parties, the current position of the claim for outstanding rentals remains as reflected in the pleadings, i.e. the defendant denies liability for the same. Therefore, there being no admission of liability for the claim for outstanding rentals, the condition in O.17, r.7 (1) (a) has not been satisfied.

12. In my considered view, bearing in mind the defendant's denial of liability for outstanding rentals and having not had the benefit of hearing the testimony of both parties on this aspect, I cannot fairly and justly conclude that I am satisfied that if the claim for outstanding rentals for the period September to November goes to trial, the plaintiff will obtain judgment for a substantial amount of money. The condition in O.17, r.7 (1) (c) has also been not been satisfied.
13. The plaintiff has not obtained judgment against the defendant and this is not an action for possession of land. Therefore the conditions in O.17, r.7 (1) (b) and (d) have also not been satisfied.
14. The plaintiff's application is premised on O.17 of the Rules. Since none of the conditions precedent to granting an order of interim payment under that Order have been satisfied, I must decline to grant the said order. The application is therefore dismissed with costs to the defendant.

Made in Chambers this 6th day of October, 2017.


Annabel Mtalimanja

JUDGE