Republic of Malawi

IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CASE NO. 58 OF 2021
(Before Msungama, J.)

BETWEEN:

JAILOSI WILLIAM NAMALAWA

T/A Namalawa Investment .....CLAIMANT

AND

FIRST CAPITAL BANK PLC ..... DEFENDANT

CORAM:

MSUNGAMA, J.
Counsel Domasi, for the Claimant
Counsel Mtokale & Counsel Kumwenda, for the Defendant
Makonyo, Court Clerk

Judgment

1. The Claimant, one Jailosi William Namalawa, is a Malawian businessman who, at all material times, has conducted his business under the name of Namalawa Investments. The Defendant is one of the commercial banks plying its trade in Malawi. The basis of the Claimant's claim against the Defendant is the failure and / or refusal by the Defendant to discharge the charges that it registered on the Claimant's property by way of security for financial facilities which were extended by the Defendant to the Claimant.

The pleadings

2. By his statement of case, the Claimant states that he obtained a loan in the sum of MK9,500,000 as working capital from OIBM Bank, (a bank which was subsquently acquired in its entirey by the Defendant) to finance his Chibuku beer distrubutorship business. The loan was secured by a charge over his property comprised in Title Number Bangwe 1/7 ("the Property"). He further states that in April 2018 he obtained another facility (a lease hire facility) in the sum of MK14,500,000 from the Defendant to finance the purchase of truck registration number MN 3088 which facility was secured by a further charge on the Property and the truck itself. The MK9,500, 000 loan and the truck leasing facility were repaid on 20th June, 2018 and 6th June, 2019 respectively. However, the Defendant discharged the security on the truck only and promised to discharge the charge over the Property later. Later in 2020 he secured a contract worth MK320,000,000 to distribute Castel Malawi Limited products which required a bank guarantee. The Defendant was requested to provide such a guarantee but eventually declined to do so. Upon the rejection by the Defendant to provide this guarantee, he approached NBS Bank which was ready, able and willing to issue the guarantee provided the Claimant issued a charge over the Property. When he approached the Defendant for his documents and also a discharge of the charge over the Property, the Defendant claimed that he still owed them money and proceeded to only partially discharge the charge. NBS Bank refused to create their own charge over the Property because the Defendant's security was only patially discharged. This scenario resulted in Castel Malawi Limited cancelling the contract thereby occasioning loss to him. The Claimant feels that the conduct of the Defendant amounted to a breach of its contractual duty to discharge the security and deliver the Property documents to him and further amounted to a breach of its duty as a contructive trustee to act in his best interest. Further, the Claimant asserts that the Defendant acted negligently in refusing to discharge, release and deliver the Property's title documents to him. This conduct on the part of the Defendant, according to the Claimant, amounted to conversion.

3. By reason of the Defendant's conduct, the Claimant is of the view that Defendant breached its statutory and common law duties resulting in him losing the contractual amount of MK320,000,000 aforementioned. In the circumstances, the Claimant is claiming the said sum from the Defendant and also the following additional reliefs:

    a) Discharge of the charge over the Property and delivery of the title documents in respect thereof.
    b) Damages for loss of business.
    c) Damages for loss of profits.
    d) Damages for breach of contract.
    e) Damages for breach of duties of a trustee.

f) Damages for negligence.
g) Damages for conversion.
h) Any such other or further relief as this Court may deem appropriate.

4. The Defendant disputes the claim. In its defence filed with the Court it admits advancing several financial facilities to the Claimant and states that apart from the facilities which are mentioned in the Claimant's statement of case it also advanced other facilities in the sums of MK5,000,000 and MK15,000,000 both of which were secured by the Property. The Defendant further contends in its defence that the Claimant has not fully serviced the facilities secured by the Property. It is further denied that the Defendant made any assurance to the Claimant that it would advance him a MK35,000,000 guarantee. The Defendant admits that it indeed only partially discharged the charge, but that because the Claimant still owed money to the Defendant. Further the partial discharge was effected on the basis of what the Claimant indicated to them, to wit, that the NBS Bank was willing to avail him the guarantee if there was a partial discharge of the charges registered on the Property. Thus, the Defendant denies that it acted in breach of any law, contract or duty or that the Claimant suffered any damange or that he is entitled to any of the reliefs sought by him in this action.

Evidence

For the Claimant

5. The Claimant filed a witness statement which was adopted as his evidence in Chief. He was cross examined and re-examined on his evidence. He was the only witness who testified on his side. It was his evidence that initially, as a businessman, he used to distribute Chibuku beer in Zomba and Phalombe. He started his business in the year 2016. At that time he opened two bank accounts with the Limbe Branch of OIBM Bank. One account was in his personal name and the other was in the name of his business. He later applied for and got a loan from the said OIBM Bank in the sum of MK9,500,000 and used the Property as security. A charge was registered in favour of the OIBM Bank. He tendered a copy of this charge as Exhibit JWN1.

6. On 3rd November 2017 the OIBM Bank was wholly acquired by the Defendant and on 20th January, 2018 the Defendant wrote him confirmng that his indebtedness was MK6,333,333.36. He tendered this letter as Exhibit JWN2. However, for him to be able to execute this contract, he required to have an overdraft facility which he requested the Defendant to avail him through his business account. The Defendant approved an overdraft facility for him in the sum of MK10,000,000. The letter of approval was tendered as Exhibit JWN3. The security for this overdraft facility was his Nissan Diesel truck Registration Number BP 3542. He tendered the security

Agreement as Exhibit JWN4. The overdraft was for a period of 12 months and was expiring on 31 December, 2018. He finished paying the original OIBM loan on 20th June, 2018 and this was confirmed by the Defendant in a statement sent to him. This bank statement was tendered as Exhibit JWN5.

7. In August 2018 he agreed with the Defendant to finance the acquisition of another truck. A leasing facility was entered into in respect of this arrangement. Further, it was agreed that as further security for the leasing facility he had to execute a further charge on the Property in the sum of MK5,000,000. The lease facility letter of offer which was duly signed by both parties and the further charge were tendered in evidence as Exhibits JWN6 and JWN7. This meant that he now had two credit facilities with the Defendant, namely the MK10,000,000 overdraft facility and the truck lease facility in the sum of MK14,500,000.

8. The overdraft facility was renewed in November, 2018 and increased to MK15,000,000. This facility was secured by two trucks registration numbers BQ 6772 and BN 9915 on top of motor vehicle registartion number BP 3542. The overdraft renewal letter was tendered as Exhibit JWN9.

9. The truck lease facility was cleared on 6th June, 2019. He tendered a bank statement showing the said clearance as Exhibit JWN11. This clearance meant, in his view, that his Property was no longer encumbered.

10. In January, 2020 the Defendant demanded that he should surrender to them the three motor vehicles which were pledged as security. He duly surrendered the vehicles. However, the Defendant only mananged to take possession of only one vehicle, registration umber BN 9915 as the other had a dead battery and the third one was out on hire.

11. In January 2020, he got an offer from Castel Malawi Limited to distribute their products. However, one of the conditions for this contract was that he should secure a bank guarantee. He called the Defendant and spoke to one Zeenat Jussab, Head of Credit and informed her that he needed to have the charge over the Property discharged to enable him use it to get a bank guarantee from another financial institution. Zeenat Jussab pleaded with him not to go to another bank as the Defendant was going to help him in this respect. He later met the Defendant's officials who promised him that the Defendant would issue the guarantee if he reduced his overdraft exposure. He obliged and paid the Defendant the sum of MK3,500,000 on 31st Jnauary, 2020 to facilitate the issuing of the guarantee by the Defendant to Castel.

12. The Defendant later indicated to him that they could only issue a bank guarantee in the sum of MK35,000,000 and not MK50,000,000 as was required by him. However, on 17th March, 2020 he was informed by the Defendant's officials that his application had been rejected.

13. Upon this rejection, the Claimant approached other banks for the guarantee. He also requested the Defendant to discharge the charges they had over the Property to enable him use it to secure the guaratee from other fianancial institutions. NBS Bank indicated its willingness to avail him the bank guarantee. The NBS Bank letter of offer was tendered in evidence as Exhibit JWN21. The Defendant refused to discharge the charges over the Property but eventually only discharged the charges to the extent of MK5,000,000. The partial discharge document was tendered in evidence as exhibit JWN23.

14. The witness stated that he never executed any document pledging the Property as security for the MK15,000,000 overdraft facility. It was therefore wrong for the Defendant to cling to the charges. His business went down as a result of the Defendant's refusal to release the Property as he was unable to benefit from the the contract that had been offered to him by the Castel.

15. He continued to state that he never obtained a loan in the sum of MK5,000,000 from the Defendant. The only instance when he had a MK5,000,000 issue was when the Defendant created a further charge in that amount when it assisted him with a discounted leasing facility for truck registration number MN 3088 and also when his overdraft was enhanced to MK15,000,000.

16. He never did, at any point in time, instruct the Defendant to partially discharge the charges over the Property. His demand was for them to fully discharge the charges over the Property.

For the Defendant

17. The Defendant called one witness, one Rodney Bossom who, at the time of the trial, was employed by the Defendant as Assistant Credit Recoveries Manager. He adpoted his witness statement as his evidence in chief. He was cross-examined by the Claimant's counsel and was subsquently re-examined by Counsel for the Defendant. It was his evidence that the Claimant obtained a loan in the sum of MK9,500,000 from OIBM bank before the said bank was subsquently acquired in whole by the Defendant. The loan was secured by a charge over the Property.

18. By his letter of 25th November, 2017 the Claimant requested for an overdraft facility from the Defendant in the sum of MK10,000,000. The copy of the letter was tendered in evidenec as Exhibit RB2. The overdraft facility was granted to the Claimant and the facility agreement which the parties entered into in respect thereof would comprise of charge that was held on the Property and a security agreement over motor vehicle registration Number BP 3542.

19. In August 2018 the Claimant obtained a discounted lease facility in the sum of MK14,500,000. The facility letter in respect of this facility was tendered in evidence as exhibit RB4. This document indicated that the security in respect thereof would comprise a security agreement for MK14,500,000 over motor vehicle registration Number MN 3088 and a further charge for the sum of MK5,000,000 over the Property. The overdraft facility was renewed and enhanced to MK15,000,000 for 12 months and the facility letter which was written to the Claimant for this was tendered as Exhibit RB5.

20. The Claimant serviced the first two facilities but failed to service the overdraft facility and some amounts remained owing as at the date of making the sworn witness statement. An extract of the Claimant's bank stement from the beginning of 2019 was tendered in evidence as Exhibit RB6.

21. In January 2020 the Claimant requested the Defendant to avail him a MK50,000,000 bank guarantee for a contract he was negotiating with Castel Malawi Limited. This was declined beause of the status of the Claimant's account. A further request for a MK35,000,000 guarantee was also rejected by the Defendant for the same reason.

22. The Claimant later informed the Defendant that he had negotiated with NBS Bank to give him a bank guarantee and that the said bank had indicated that they would need to create a charge over the Property as security for the guarantee. In order to assist the Claimant, the Defendant made a partial discharge of the charge to enable NBS Bank issue the guarantee.

23. The Defendant is entiltled, in as far as the witness was concerned, to continue maintaining its security over the Property under the overdraft facility which was also secured by the same charges.

Issues

24. Although the parties through their documentation appera to indicate that there a lot of complicated issues fro determination by the court, in my view the the issues can and should be summarised as follows:

a) Whether there are still outstanding amounts owing from the Claimant to the Defendants which are secured by the charges registered in fovour of the Defendant.

b) If the answer to a) above is in the affirmative, whether the Defendant is entitled to maintain the charges on the property as security for the sums owing to them.

c) If the answers both a) and b) above are not in the affirmative, whether the Claimant is entitled to the reliefs outlined in his stetement of case.

The law

29. The relevant provisions of the Registered Land Act in as far as this matter is concerned are as follows:

> *60.—(1) A proprietor may, by an instrument in the prescribed form, charge his land or lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 68 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.*
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> *(2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.*
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> *(3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.*
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> *(4) A charge shall not operate as a transfer but shall have effect as a security only...*
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> *61. A proprietor whose land or lease or charge is subject to a charge may create a second or subsequent charge in the same manner as the first charge and the same provisions shall apply thereto, but any sale under the power expressed or implied in any such charge shall be expressed to be subject to all prior charges unless all those charges have been discharged...*
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> *65. The amount secured, the method of repayment, the rate of interest or the term of the charge may be varied by the registration of an instrument of variation*

executed by the parties to the charge, but no such variation shall affect the rights of the proprietor of any subsequent charge, unless he has consented to the variation in writing on the instrument of variation.

66.—(1) Subject to this section, a chargor, on payment of all money due and owing under the charge at the time of payment or on fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 68, may redeem the charged land or lease or charge at any time before it has been sold under section 71, and any agreement or provision which purports to deprive the chargor of this right of redemption shall be void.

75.—(1) A discharge, whether of the whole or of a part of a charge, shall be made by an instrument in the prescribed form, or (if of the whole) the word "Discharged" may be endorsed on the charge or the duplicate or triplicate and the endorsement executed by the chargee and dated.

(2) A discharge shall be completed by cancellation in the register of the charge, or part thereof as the case may require, and filing the instrument of discharge or the endorsed charge.

76. Upon proof to the satisfaction of the Registrar—

(a) that all money due under a charge has been paid to the chargee or by his direction; or Application of purchase money Variation of powers No right of entry into possession or foreclosure Discharge of charge Satisfaction of charges

(b) that there has occurred the event or circumstance upon which, in accordance with any charge, the money thereby secured ceases to be payable, and that no money is owing under the charge, the Registrar shall order the charge to be cancelled in the register, and thereupon the land, lease or charge shall cease to be subject to the charge.

77. Provision may be made in the charge for a chargee to make further advances or give credit to the chargor on a current or continuing account, but, unless that provision is noted in the register, further advances shall not rank in priority to any subsequent charge except with the consent in writing of the proprietor of the subsequent charge

Burden of Proof

25. The legal burden of proof as to any fact in issue in a civil matter lies upon the party who affirmatively asserts that fact and whose claim or defence proof of the fact in issue is essential. In **Joseph Constantine Steamship Line v Imperial Smelting**

Corporation Ltd[1] Viscount Maughan was of the view that "it is an ancient rule founded on good considerations of good sense and it should not be departed from without strong reason"[2]. The essential elements of a claim or a defence are determined by reference to the substantive law.

26. If the claimant fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is, somehow different. Since the claimant affirmatively asserts his claim, he bears the burden of proving his claim. However, if the defendant asserts a defence which goes beyond a mere denial (an affirmative defence), the defendant must assume a legal burden of proving such a defence. An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form part of the claimant's case. If, for example, the claimant claims that the defendant injured him by a negligent act, the defendant may deny negligence without assuming any legal burden of proof. However, if the defendant goes on to assert that the claimant was injured through his own negligence, he asserts an affirmative defence not raised as a fact in issue by the claimant's case, and must therefore bear the burden of proof of that fact.

27. It is essential that every party must prove each necessary element of his claim or defence. There are cases, however, where it is not easy to determine to whose case a fact in issue is essential, and who should be held to fail if a fact in issue is not proved. In such cases, the courts have inclined to require proof of the party to whom the least difficulty or embarrassment will be caused by the burden. This in turn leads to two guidelines which are usually followed: a) each party should prove facts peculiarly within his own knowledge; and b) proof of a positive proposition is to be preferred to proof of a negative. In the **Joseph Constantine**[3] case, charterers claimed damages from the shipowners for breach of charterparty. The defendants claimed that the contract had been frustrated by the destruction of the ship by an explosion, the cause of which was unclear. Such frustration would have concluded the case in favour of the defendants in the absence of any fault on their part. In view of the unsatisfactory state of the evidence, the question of who bore the burden of proving or disproving fault was of crucial importance. The House of Lords held that to require the defendants to prove a negative (the absence of fault) would be unduly onerous. The reality was that the claimants had asserted the existence of fault and should be required to prove it.

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[1] [1942] AC 154,
[2] at 174
[3] Ibid

28. In **Levison v Patent Steam Carpet Cleaning Ltd**[4] , the defendants were guilty of the unexplained loss of the plaintiff's Chinese carpet, which had been delivered to them for cleaning. A clause in the contract signed by the plaintiffs would have exempted the defendants from liability for negligence, but not for fundamental breach of contract. It was necessary to determine where the burden of proof of the latter issue lay. The Court of Appeal held that the defendants would find the burden far less onerous, the circumstances of the loss being peculiarly within their knowledge, and accordingly, they bore the burden of proof. This is in accord with the rule in cases of bailment that it is for the defendant to show that the loss or damage was not caused by want of reasonable care on his part. Similarly, in a case where conversion is alleged, the burden lies on the bailee to show that he dealt with the goods consigned to him in good faith and without notice of the rights of any person who may transpire to be the owner of the goods[5].

29. In **Rhesa Shipping Co. SA v Edmunds** [6] the plaintiff shipowners sought to recover against underwriters in respect of the loss of their vessel, the *Popi M.* The ship had been lost in the Mediterranean in calm seas and good weather and the wreck could not be salvaged. The evidence showed that she had sustained a large hole in her side shell plating, which resulted in flooding which sank the vessel. It was the cause of this damage on which the case turned. The plaintiffs contended that the ship had struck a submerged submarine and argued that this amounted to a loss of the ship by the perils of the sea, which was covered by the policy. The defendants asserted that the loss was caused by 'wear and tear', i.e., the poor condition into which the plaintiffs had allowed the vessel to fall. The trial judge ruled out the explanation given by the underwriters because it did not adequately explain the known damage to the ship. Equally, however, he regarded the explanation about the submarine, which was wholly unsupported by independent evidence, as extremely improbable. On the basis of these findings, the judge found for the plaintiffs, since the defendants had provided no acceptable explanation to rebut the plaintiff's claim. The decision was upheld by the Court of Appeal. On appeal to the House of Lords, the underwriters prevailed. The House held that the trial judge had not been obliged to choose between two competing theories, merely because the underwriters had chosen to put forward an explanation for the loss. The plaintiffs had borne the legal burden of proof on the issue whether the ship had been lost by the perils of sea. Since the judge had found that the evidence adduced to support the claim was extremely improbable, he ought to have held that the plaintiffs had failed to discharge their burden of proof. The important point raised by this case is that the burden of proof is the burden to prove

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[4] [1978] QB 69

[5] *Marcq v Christie Manson & Woods Ltd (trading as Christie's)* [2002] 4 All ER 1005, *Kuwait Airways Corporation v Iraqi Airways Co.* [2002] 2 WLR 1353

[6] [1985] 1 WLR 948 (HL)

that the facts relied on are more probable than not, and not merely that they are more probable than an explanation advanced by the other side. Lord Brandon, at the beginning of his speech stated:

> *"In approaching this question, it is important that the two matters should be borne constantly in mind. The first matter is that the burden of proving, on a balance of probabilities, that the ship was lost by perils of the seas is and remains throughout on the shipowners. Although it is open to the underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they choose to do so, there is no obligation on them to prove, even on the balance of probabilities, the truth of their narrative."*[7]

Standard of Proof

30. The standard of proof in civil matters is proof on the balance of probabilities. This simply means that when you look at a version of facts as advanced by the parties, or which can be drawn from the inferences within the case, which one is more likely to have occurred than not. The court must form a judgment on the balance of probabilities as to which fact it accepts and which it does not before going on to find for one party or the other. There are a number of decided cases which have sought to clarify the definition of the term 'proof on the balance of probabilities". For example, in **Secretary of State for the Home Department v. Rehman**[8], Hoffman L, stated:

> *"It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."*

31. In **Re B (Children)**[9], the same learned judge stated as follows:

> *"If a legal rule requires a fact to be proved, a judge or jury must decide whether or not it happened. There is no room for a finding that it might*

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[7] P. 951
[8] [2001] UKHL 47
[9] [2008] UKHL 35

have happened. The law operates a binary system in which the only values are 0 to 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, the value of 1 is returned and the fact is treated as having happened."

32. In **re H (Minors) (Sexual Abuse: Standard of Proof)**[10], Lord Nicholls of Birkenhead stated as follows:

> *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a fact, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than an accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*
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> *Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on the balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."*

Discussion and disposal

33. It is not disputed that the parties executed and had registered two charges (an initial charge and a further charge) over Property. That these charges were intended to secure certain liabilities owed by the Claimant to the Defendant is not in dispute at all. What is in dispute is whether all liabilities which were secured by the charges

[10] [1966] AC 563 at 586 D-H

were liquidated by the Claimant so that the Defendant should have been obliged to discharge the charges registered in its favour. The position of the Claimant is that there is nothing owing on the charges so that the continued maintenance of the charges is wrongful and has resulted in him suffering loss and damage. On the other hand, the Defendant is of the firm view that there are still outstanding liabilities which are secured by the charges entitling it to maintain the charges which would allow it to exercise its remedy of sale to recover the amounts still owing to it.

34. The Claimant argues that for a charge to be effective it has to be registered and that a lender cannot insist on his rights as a chargee if there is no registration. Counsel for the Claimant cites the following authorities for this position: **Finance Corporation of Malawi Ltd v New Building Society & Attorney General** Civil Cause No. 3455 of 2001, **Finance Bank of Malawi Limited v Hon. Dr. Hetherwick Ntaba** , Civil Cause No. 1171 of 2005; **Chikho v Stanbic** Civil Cause No. 2783 of 2005; **Karim T/a Pawoo Timber Carpentry & Joinery v Indebank Limited & Anor** [2013]. I agree with the Claimant that this represents the position of the law and no one can argue with this. The Claimant further argues that although there is power to have a registered charge varied, the variation has to be registered (**Mapanga Furniture Limited & Anor v Henderson Dickson Chagwamnjira t/a Chagwamnjira & Company & Anor** Civil Cause no. 28 of 2007) and that such variation can only relate to the amount secured, the method of payment, the rate of interest and the term. He also argues that the overdraft facility of January, 2018 and the enhanced overdraft facility of January, 2019 were credit facilities which substantially varied the first charge since the two facilities provided different principal amounts, interest and also security. In terms of S.65 of the registered Land Act the variations should have been registered, which the Defendant failed to do. The Claimant argues that the failure to register meant that the initial charge merely secured the sum of MK9,500,000 plus interest thereon and contingencies. It is contended that clauses such as "all monies" are not allowed under the scheme of the Act simply because future advances will have come with new terms effectively altering the original charge.

35. On the other hand, it is argued by the Defendant that when you read S.60(1) of the registered Land Act, it is clear that a charge can be created in four instances, viz: for a present debt, a future debt, a contingent debt and fulfilment of a condition. It is therefore possible to create a charge to cater for a contingent liability which is an obligation that is not presently fixed and absolute but which will become so on the happenning of some future and unceratain event. The Defendant continued to argue that a charge does not become ineffective merely because it makes reference to a future contingent debt.

36. It is not in dispute that in January 2018 the Defendant approved and provided the Claimant an overdraft facility in the sum of MK10,000,000 based on the terms as contained in the Defendant's offer letter dated 30th January 2018 which was tendered by the Claimant as Exhibit JWN3. In relation to security for the said overdraft, JWN3 provided as follows:

> ***"Security Held:*** *(i) Legal Charge for MK9,500,000 registered as application number 958/2017 over property title number Bangwe 1/7, Plot number 93 Namiyango in the City of Blantyre*
>
> ***Security Required:*** *(i) Security Agreement for MK10,000,000.00 over motor vehicle registration number BP 3542.*
>
> ***Other requirements:*** *(iii) insurance policy ocer property title number Bangwe 1/7 Plot number 93 Namiyango in the city of Blantyre (to be submitted).*
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> *(iv) Proof of payment of city rates over property title number Bangwe 1/7, plot number 93 Namiyango in the City of Blantyre (to be submitted)*
>
> *(v) Valuation report over property tiltle number Bangwe 1/7 , plot number 93 Namiyango (original to be submitted).*
>
> *(vii) inspection reports with coloured pictures over property title number Bangwe 1/7, plot number 93 Namiyango in the city of Blantyre and motor vehicle registration number BP3542 (to be submitted).*"

37. I have aslo had a look at the Claimant's letter of 25th November 2017 which was his application for the overdraft facility. In that letter tendered by DW 1 as Exhibit RB3 the Claimant actually offered the Property as part of the security he inteded to secure the facility. It is further not in dispute that in August 2018 the Claimant obtained a discounted lease facility in the sum of MK14,500,000 and the security that was agreed by the parties to secure the facility included, apart from a security agreement over motor vehicle registration number MN3088, a further charge over the the Property. It is further not in dispute that in January, 2019 the MK10,000,000 overdraft facility was renewed and enhanced to MK15,000,000 and the parties agreed, at least according to the facility letter signed by both parties and tendered by DW1 as Exhibit RB5, that the security for this facility included a further charge in the sum of MK5,000,000 apart from the original charge that was already held by the Defendant over the Property

38. DW1 told the court that the Claimant serviced the first two facilities but failed to service the overdraft facility and as at the time he was making his statement, the Claimant still owed the Defendant the sum of MK21,789,586.77. He tendered into court the Claimant's account statement as Exhibit RB6 which showed this amount as outstsnding. I must say that this piece of evidence was not impeached in the course of the proceedings. Indeed, the Claimant admitted in cross examination by counsel for the Defendant that he had not liquidated the the overdaft facility. In this respect, I make a finding that the Claimant still owed the Defendant the said specified amounts on the overdarft facility that was availed to him. Having so found as above, my duty is now to determine if the amount still owing is secured by the charges that the Defendant registered over the Property thereby entitling it to refuse to discharge the charges it still has over the Property.

39. The wording of the original charge included, in as far as what it secured it provided as follows:

> *"Secured Sums"*
> *Means all money and liabilities which shall for the time being be owing or incurred to the Chargee by the Borrower whether actually or contingently and whether solely or jointly with any other person and whether as principal or surety including sums becoming due under this charge and interest discount commission or other lawful charges and expenses which the Chargee may in the course of its business charge for keeping the Borrower's accountor in respect of any of the matters specified above and so that interest shall be computed and compounded according to the usual mode of the Chargee as well after as before any demand made or judgment obatained or the appointment fo a receiver and / manager.*
> *Or*
> *Money and liabilities advanced or to be advanced to me by the bank and such other sum as the Chargee may advance to me at a later date together with interset thereon computed at the base rate of 35% plus a margin of 4% making an effective rate of 39% per annum or such other rate as the Chargee may charge from time to time.*
> *Or*
> *A loan facility in the sum of nine million five hundred thousand malawi kwacha (MK9,500,000) part of the facility of nine million five hundred thousand kwacha repayable in terms of a fcaility letter dated 2017 and signed between the Borrower and the Chargee.*

40. In my humble view, the documentation which has been tendered clearly show that that it was the intention of the parties that the overdaraft facilities were to be secured partly by the charge/s registered on the Property. Although these facilities were

granted way after the original charge had been registered, they were nevertherlless secured by them. This is allowed by the relevant provisions of the Registered Land Act particularly S.60(1) which allows a proprietor to "*charge his land or lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition*" . I do not agree with the Claimant that since there was no further charge particulary created to secure the overdraft facilities then the court should hold that the borrowing was not secured by the charge. The liabilities still owing to the Defendant by the Claimant are certainly within the campus of the provisions of the Charge under the definition of "sums secured" which includes " *all money and liabilities which shall for the time being be owing or incurred to the Chargee by the Borrower whether actually or contingently and whether solely or jointly with any other person and whether as principal or surety including sums becoming due under this charge and interest discount commission or other lawful charges and ...*" or *Money and liabilities advanced or to be advanced to me by the bank and such other sum as the Chargee may advance to me at a later date together with interset thereon...* " By his own admission and indeed as confirmed by the uncontroverted evidence of DW1, there are still certain sums that are still outstanding on the overdraft facilities granted to the Claimant by the Defendnat. In my considered judgment, the Defendant is quite entitled to hold on to their security until the Claimant has liqudated his indebtednees with the Defendant. This conclusion effectively disposes of the matter. I, therefore, find that the Claimant has failed to prove his case to the requisite standard in this action against the Defendant. His action is, therefore, dismissed in its entirey. Consequently, the costs of the proceedings are awarded to the Defendant. These will be assessed by the Assitant Rgistrar if not agreed by the parties.

Delivered in open court this 13 day of May, 2022 at the High Court, Commercial Division, Blantyre Registry.

M.T. Msungama
JUDGE

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