



IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
PRINCIPAL REGISTRY
COMMERCIAL CASE NUMBER 23 OF 2023
(Before the Honourable Justice Dr Kachale)

JINDAL FINE INDUSTRIES (A FIRM).....CLAIMANT
-AND-
MOSHIN MUSSA t/a MUSSA NURMAHOMED.....1ST RESPONDENT
MOSHIN MUSSA.....2ND RESPONDENT
MAHOMED MUSSA.....3RD RESPONDENT

CORAM: HON. JUSTICE DR. CHIFUNDO J. KACHALE, Judge
Mwangomba, of Counsel for the Claimant
Banda, of Counsel for the Respondents
Kapoloma, Law Clerk

Decision on Application for Summary Judgment

(Under Order 12 Rule 23(1) of the Courts (High Court) (Civil Procedure) Rules 2017)

1. In these proceedings the Claimant is an Indian based business entity which has sued the Defendants who are resident within the jurisdiction. The action is for payment of US\$160,003.57 for outstanding invoices in respect of goods allegedly supplied by the Claimant to the Defendant; as well as interest, collection costs at 15% of the total sum due as well as costs of the action. The Defendants deny collecting goods worth the sum claimed; rather they contend that any goods supplied were for purposes of exploring the viability of any local market i.e. they never imported goods for sale but to test the market. However, due to the public health crisis of Covid-19 it affected the uptake and interest of the market and things never took off as anticipated.

2. Meanwhile, after the termination of mediation, the Claimant filed the present process seeking summary judgement; it being contended that through some documents and correspondence produced in the Claimant's sworn statement, the Defendants have clearly admitted facts that render their purported defence untenable. So, on the authority of Order 12 r23(1) CPR (2017) it has been claimed that there is no arguable defence to the entirety of the claim on file. As such the Court has been urged to enter judgment in favour of the Claimant accordingly. In response, the Defendants contend that the summons were not signed by the Claimant or Counsel and are therefore irregular. Besides, they allege that they are not the correct parties to the action (suggesting something of a mistaken identity by the Claimant). As far as the substance of the claim is concerned, the Defendants claim that no goods were supplied for sale per se; rather that whatever goods were received by them had been intended for purposes of exploring the market before more substantial consignments would be shipped into Malawi from India.

3. In addressing the issue pertaining to the sworn statement relied upon in support of the claim herein, the Court has found the discussion of the law on that aspect ably canvassed in the recent Constitutional Court decision of **Jam Willem Akster-v-The State & Another, Constitutional Reference No. 2 of 2021** (unreported). In delivering the unanimous opinion of the 3-judge panel on similar preliminary objections, my brother Mambulasa, J expounded the law thus:

The law governing the making of sworn statements is found in three pieces of legislation. The first is the Oaths, Affirmations and Declarations Act.⁸ The second is the General Interpretation Act.⁹ The last one is a subsidiary legislation, Order 18 of the Courts (High Court) (Civil Procedure) Rules, 2017. Section 10 of the Oaths, Affirmations and Declarations Act¹⁰ is couched in mandatory terms when it states that:

Any commissioner for oaths before whom any oath, affirmation or affidavit is made or taken and every person before whom a statutory declaration is made shall state truly in the jurat or attestation at what place and on what date the oath, affirmation affidavit, or declaration is made or taken.

In *Group Village Headman Chisazima et al-vs- Phillip Joseph Chasowa et al* Msiska, J noted that Order 18 of the Courts (High Court) (Civil Procedure)

Rules, 2017 sets out in considerable detail the rules applicable in taking sworn statements; the contents of the sworn statements and the form in which sworn statements are to be presented. There are also set out in the rules the consequences for any deviation from the prescribed form and that the rules are fairly elaborate. One such rule is rule 7 (5) (b) which requires that a sworn statement shall contain an authorizing part at the end of the body of the statement that states the place the person made the sworn statement. The other rule is rule 7 (4) which requires that the full name of the deponent and the date on which the sworn statement was sworn shall appear on the first visible page of the sworn statement.

A sworn statement has been defined in simple terms as a written document containing material and relevant facts or statements relating to the matters in question or issue and sworn or affirmed and signed by the deponent before a person duly authorized to administer any oath or affirmation or take a sworn statement. It constitutes evidence on oath upon which a court determines the matter and makes an order or render judgment.

Msiska, J further noted that on a wider canvas, there is no doubt that the use of sworn statements is often an effective method of presenting information critical to the court's evaluation of the merits of a case or an application before it. The significance of properly compliant affiant submitted evidence, and the maintenance and enforcement of standards established for sworn statements is as important as the integrity of the justice system itself.

Section 5 of the General Interpretation Act is couched in the following terms:

Where a form is prescribed or specified by any written law, deviations therefrom neither materially affecting the substance nor calculated to mislead shall not invalidate the form used.

In the *Chisazima* decision, the Court observed that this section sheds light on the practical consequences of defects in form on one hand and in substance on the other. If deviations are in form, they are not fundamental defects or irregularity and thus curable. If deviations are in substance, then, they are not curable. They would result in the sworn statement being declared a nullity.

Order 18, rule 19 of the Courts (High Court) (Civil Procedure) Rules, 2017 is in agreement with section 5 of the General Interpretation Act. It is to the effect that a sworn statement shall not be used in a proceeding without the permission of the Court if it has not been filed or it has been filed in a defective form. Rule 18 of the same Order states that unless the Court orders otherwise, a sworn statement may be filed despite any defects in form.

4. With those clear views on the question of alleged irregularity of the sworn statement of the Claimant in issue, the Court notes that the Defendants merely raise issues of form and not substance. The Court is therefore satisfied that under the relevant law, there is no valid basis

for excluding or expunging the sworn statement from these proceedings: it being clearly discernible from the entirety of the document that it was made by one Ganesh Bhardwaj (Manager in Foreign Trade at the Claimant's business) on 31st August 2023 at Blantyre before a Legal Practitioner by the name Chikondi Alfred Khondiwa. That particular objection from the Defendants has thus been dismissed for lacking legal merit.

5. On the other hand, the Claimant has argued that the sworn statement of Counsel Banda which has been relied upon in opposition to the present summary judgment application is not permissible and should be excluded from these proceedings. The decisions of **Norse International-v- Group Five International, Civil Cause No. 2309 of 1995** (unreported) as well as **The State-v-The National Assembly, ex p. JZU Tembo, Civil Cause No. 565 of 2009** (unreported) have been cited in support of the legal proposition that unless the Court is dealing with interlocutory matters, Counsel is precluded from filing their own sworn statements (as opposed to those of the litigants); in the present case it has been contended that by this process, if it succeeds, the case will be finally disposed of, as such it is irregular for the Defendant to rely on the sworn statement of counsel, which we have been urged to exclude. With this well-established principle of legal procedure, the Court is in full agreement, and the sworn statement of Counsel Madalo Banda made on 23rd May 2024 is hereby excluded from these summary judgment proceedings.
6. Pertaining to the claim that the second and third defendants are not the correct parties, the Court finds that assertion difficult to sustain because the available evidence establishes that the Claimant's officer who has deponed the evidence on oath (which has been upheld by the determination in the preceding paragraph) there is proof that various correspondence was exchanged between these defendants and the Claimant's officers; it would appear that this issue of identity is not substantiated by the evidence but represents an ill-advised attempt to evade responsibility for a business deal that might have gone bad.
7. For example, Exhibits GB8 and GB9 are signed by Moshin Mussa as Partner and bears the stamp for Mussa Nurmahomed on their letter headed paper. Likewise Exhibit GB14 is an email to Mahomed Mussa addressing both him and Moshin Mussa; according to this email the

deponent of the sworn statement met the Defendants on a visit to Malawi in March 2021. The effect of these pieces of evidence is to rebut the suggestion that somehow the two are not linked to the business transactions which form the crux of this case. At this stage, the Court is therefore satisfied that the action has been brought against the correct Defendants (both as a partnership and individually).

8. As regards the present application which comes under Order 12 Rule 23 (1) of the CPR (2017), that rule simply states that

The claimant may apply to the Court for a summary judgment where the defendant has filed a defence, but the claimant believes that the defendant does not have any real prospect of defending the claim.

9. Commenting on the predecessor to the above-cited rule (namely Order 7 rule 1(1) of the then High Court (Commercial Division) Rule- under which applications of this sort could be made-the learned Justice of Appeal Katsala (delivering the unanimous determination of the Supreme Court) in the case of **Standard Bank Limited-v-Tourism Investments Ltd & Euro Industries Ltd, MSCA Civil Appeal No. 17 of 2018 (unreported)**, made the following instructive observations

Clearly, when faced with an application for summary judgment and or judgment on admission, there are a number of factors that the court needs to look at before it can enter judgment...First, it has to satisfy itself that indeed the defendant has no defence to the plaintiff's claim or part thereof except as to the amount of damages claimed...Secondly, the defendant has not raised an issue, a question or dispute which ought to be investigated through a trial. Thirdly, that there is no reason warranting a trial in respect of the claim or part thereof...Fourthly, the admission founding the application for judgment on admission must be unequivocal....the Rules give the defendant against whom an application for judgment is made the liberty to show that he has a defence to the claim through an affidavit (in opposition to the application), his defence he has served and any other means to the satisfaction of the court. As such it is incumbent upon the court to consider all the pleadings filed by the parties, the affidavits for and against the application and the arguments presented and the law when coming up with a decision. And the judgment must show that the court has done this when coming up with its decision.

10. Applying that wisdom to the present application the Court observed that in the first place, as a preliminary point, the Defendants

contended that they have been wrongfully sued in the present action. However, in dismissing that line of defence, the Court has concluded that the documentary evidence produced in support of this application demonstrates to the required standard in civil proceedings i.e. the preponderance of evidence yardstick, that actually the Claimant knows the identity of the persons with whom they undertook the business transactions in issue. Besides the email correspondence and documents attesting to that bearing the named Defendants, the Claimant's Manager in Foreign Trade (who actually made his sworn statement within our jurisdiction) and visited Malawi in March 2021 in pursuit of the same claim has competently identified the second and third Defendants as Partners of the First Defendant (and indeed persons with whom he had business dealings).

11. Once the question of the identity of the Defendants has been settled in favour of the Claimant, the Court further observes that the Claimant has attached very pertinent documentation to evidence the importation of the goods and the full price of the entirety of business transactions between them and Mussa Nurmahomed: these are the Commercial Invoices (GB1, GB2 and GB3) and the corresponding Bills of Lading (GB4, GB5 and GB6), the specific correspondence from the Defendants admitting the debt (GB8) and making arrangements with their bank (GB7) and sending assurances to the Claimant's bank (GB8) that they are making every effort to secure foreign currency in order to settle the debt as well as assuring Claimant of a proposed payment plan (GB9). On the strength of these documents which are corroborative in nature, the Court finds that the Claimant has established that it supplied goods worth US\$175,003.57 of which only US\$15,000 has been paid, leaving an outstanding invoiced sum of US\$160,003.57.

12. Of special significance is Exhibit GB8 which is a letter dated 28th November 2020 which is signed by Moshin Mussa as partner of Mussa Nurmahomed, Wholesalers and Direct Importers. The letter is addressed to The Manager, Oriental Bank of Commerce and its contents are as follows:

Dear Sir,

RE: OUTSTANDING BALANCE ON ACCOUNT OF JINDAL FINE INDUSTRIES

Reference is made to the above subject of whom we have an outstanding balance on the following invoices:

1. Invoice No.6023	\$49,531.55
2. Invoice No. 6027	\$42,754.27
3. Invoice No. 6046	\$82,717.75

We have delayed to settle the balance due to the current business environment caused by Covid 19 as well as that currently Malawi is facing acute forex shortages. We are currently in discussion with Jindal on how best we can sort the outstanding balance. Arrangements are being made to have it sorted out by the end of January 2021.

We hope everything is in order.

Yours Sincerely,
FOR : MUSSA NURMAHOMED

Moshin Mussa
PARTNER

13. Subsequently according to GB14 (an email) in the month of March 2021 Mr Sahil Jindal and Mr Ganesh Bhardwaj (who has provided the evidence under oath to support this application) visited Malawi to chase their payment. Afterwards, in September 2022 there is communication on similar letterhead as GB8 and signed by Moshin Mussa as Partner of Mussa Nurmahomed assuring the Manager of Jindal Fine Industries that arrangements had been made with a friend in India to make part payment of \$5,000, further indicating that arrangements would be made for monthly instalments to clear the outstanding balance, determined by availability of forex in Malawi. It is the conclusion of the Court that all this documentary evidence establishes on a balance of probabilities that Claimant supplied the goods worth the sum being claimed in these proceedings.

14. According to the guidance of our apex court, before judgment can be entered on a summary basis, it is necessary to consider whether the Defendant has raised any defence or an issue which would be worth investigating in a trial. In these proceedings, the Defendants have made the suggestion that whatever goods were supplied were of such a quantity that they were only meant to be for exploratory purposes and not as a full blown business importation

volumes: in response to that line of argument the Court has taken note of the fact that there has been produced documents of importation identifying Mussa Nurmahomed as the consignee bearing the same address as the letter headed correspondence signed off by Moshin Mussa. In other words, the volume and the value of the several consignments which together constitute the sums claimed has been factually proven on a balance of probabilities to be equivalent to what is Claimed in the present action. The suggestion of exploratory consignments is clearly contradicted by the evidence, which meets the stipulated threshold in civil cases.

15. Thus, in the final analysis, a sober consideration of all the pleadings and sworn statements in light of the pertinent legal principles applicable in summary judgement proceedings as we have before our Court on this occasion leaves one satisfied to the required standard that this is a proper case in which to exercise our summary jurisdiction under Order 12 Rule 25(2) (a)(b)(i) CPR 2017 and hereby enters judgment for the Claimant for

- i. Payment of US\$160,003.57.
- ii. Plus, payment of compound interest at 2% above the Libor rate from the date each of the three invoices was due until date of full payment.
- iii. 15% collection costs.
- iv. As well as costs of the present action.

16. By reason of the outcome of the summary judgment process, the Court does not find it necessary to decide whether security for costs as requested by the Defendants would be appropriate.

Order accordingly.

Made in Chambers this 19th day of May 2025 at Blantyre.


C.J. Kachale, PhD
JUDGE