Gerald Kazembe t/a Madzi Distributors v Southern Bottlers Limited & Ecobank Malawi Limited

Judgment

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honorable Justice K.T Manda
Cause Number:	Commercial Case No. 15 of 2020
Date of Judgment:	July 17, 2024
Bar:	Mr. Maliwa, counsel for the claimant Mr. Mpaka, counsel for the 1st defendant, Mr. Machika, counsel for the 2nd defendant

Introduction

This was an application by the claimant to strike out the 18 defendant's defence and counterclaim for failure to comply with the Order of Directions of this court. The said directions were given during a scheduling conference for trial and directed the parties file witness statements and skeleton arguments within 21

days of the date of the scheduling conference. ‘The 2nd defendant joined the claimant’s application and essentially supported it. The 1st defendant opposed both applications.

The circumstances preceding this application are not in dispute. This matter was scheduled for a scheduling conference during which the parties agreed on specific directions. Paramount within those directions was the order that the defendants were supposed to file their witness statements and skeleton arguments within 21 days after being served with the claimant’s witness statements and skeleton arguments.

Arguments and Evidence

It was the evidence of Counsel Maliwa that both defendants were served with the claimant’s witness statements and skeleton arguments on the 10" of April, 2024. Counsel Maliwa further deponed that from the 10th of April, 21 days elapsed on the 21st of May, 2024 and that by this time none of the defendants had filed their processes. Noting this, it was stated that the claimant wrote the defendants on the 15th of May, 2024, requesting the defendants to advise the claimant as to when their documents would be ready. That upon receipt of the letter, only the 2nd defendant served their witness statement on the claimant on the 24th of May, 2024. The 1st defendant had not filed its witness statement and skeleton arguments by the date of hearing the
application. It was thus the claimant’s submission that they have suffered prejudice by the delay and thus prayed that the 1st defendant’s defence and

counterclaim be struck out and judgment be ended for the claimant. The same prayer was reiterated by the 2nd defendant who also said that they have also been prejudiced by the matter as the property in question was already sold to a third party, despite there being an injunction from the Supreme Court. According to the 2nd defendant, the third party has run out of patience as he is demanding the property that they bought. It was the 2nd defendant's submission that the 1st defendant defence and counterclaim be struck out.

In response, it was Counsel Mpaka's argument that this case provides this court with an opportunity to clarify and clearly state the nature of obligations on litigants after a scheduling conference. According to Counsel, Order 16 r 1 requires the claimant to file a trial bundle within 14 days with all the necessary documents. In Mr. Mpaka's view the court could have set down this matter even though there was no Trial Bundle. In this regard, Counsel Mpaka made reference to Order 14 1.4 which prescribes for a pre-trial conference where the court goes through a check list to sce if all documents have been filed. According to Counsel, the power to strike out a defence cannot be exercised independently of the process under O14 r. I since apparently at the pre-trial conference "the court can make up its mind on whether the case can be proved, because he who alleges must prove".

According to Counsel, "the claimant does not need the defendant to file his witness statement for him to prove his case". In Counsel's view, the claimant could have filed its documents and have the matter set down for a pre-trial conference and then point out at the pre-trial conference that the defendant did not file its witness statement. It is at this point that Counsel felt that an

application to strike out the defence should have been made and this is the only time the court's power to strike out a defence arises. It was thus Counsel Mpaka's submission that since the claimant did not file a notice for a pre-hearing conference, the claimant cannot file the application to strike out as the application is premature.

Secondly, it was Counsel Mpaka's assertion that they did file "witness statement and skeleton arguments in relation to the main case but that they have had challenges lodging the witness statement because of the changes in staff and the 1" defendant Company. 'That with the passage of time some of the people in the sales department had moved out and are no longer with the company. In particular, Counsel made mention of a Mr. Bauleni who apparently agreed with the witness statement but was yet to sign it. It was Counsel's submission that the period of May to June is not so long to warrant an order striking out the defence.

Thirdly, it was Counsel Mpaka's submission that this Court has power to extend time as per section 47 of the General Interpretation Act. In this regard it was Counsel's assertion that much as they were supposed to file their witness statement and skeleton arguments by the 21st of May, the claimant, after 21st May the claimant was at liberty to compile a trial bundle under
Order 16 and to set the matter down for a pre-trial conference under Order 14. In view of this, Counsel found no reason that the 1st defendant's defence and counterclaim should be struck out as the case is not ready for trial. In any event, according to Counsel, they could come trial without witnesses and simply cross-

examine the claimant’s witnesses. It was Counsel’s case that the fact that they did not lodge their documents did not bar the claimant from making their case and yet Counsel also stated that this case was not trial ready. The 2n defendant thus prayed that the defence and counterclaim should not be struck but that the court should impose other punishments as provided for under Order 14 and that the matter should be allowed to proceed to trial.

In reply, it was pointed out that the 1st defendant did not dispute the fact that it did not comply with the directions of this court and that per Order 14 1.5(b), the defence ought to be struck out. It- was submitted that the 2nd defendant was thus obligated to explain the delay in filing. Counsel Maliwa noted that the explanation given by Counsel Mpaka about change of staff should not be allowed to stand. It was noted in this regard that the witness who the 2nd defendant indicated was Laston Bauleni and that this was in May 2023, meaning that in May 2023 Bauleni was still an employee. It was also noted that it wasn’t explained as to when Bauleni left the company.

It was also pointed out that the directions were that there should be a consolidated trial bundle and not for the claimant to file their witness statement and skeleton arguments before the case could be set down for trial. It was further pointed out that the 1st defendant did not cite any cases to support their position and also that section 47 of the General Interpretations Act does not apply in this case, Further still, it was also noted that there is no application by the 2nd defendant. It was thus reiterated that the defence and counterclaim should be struck out.

Counsel Machika agreed with Counsel Maliwa who pointed out that according to the witness statement which was filed by the 1st defendant, Bauleni is still in their employ. He also agreed that there should have been a formal application to extend time. It was his submission that the 1st defendant sat on their rights and thus their defence and counterclaim should be struck out.

Issues

From the foregoing, the question that is before me is whether the 1st defendant's defence and counterclaim should be struck out and judgment be entered for the claimant. By extension I will also have to consider whether the 1% defendant has made enough of an argument to persuade me to stay my power of striking out the defence and counterclaim. All this is of course in the context of the fact that the 18 defendant has more or less conceded to the fact that they did not file their witness statement and skeleton arguments as directed by this court.

The Law

Before I go into the substantive legal principles on this subject matter, let me quickly state that I do not think that section 47 of the General Interpretations Act does apply in this instance. The section is about construction of the courts power

to extend time. The section provides as follows:

Where, in any written law, a time is prescribed for doing any act or taking any proceeding, and power is given to a court or other authority to extend such time, then, unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed.

The reading of this section clearly refers to written law and NOT court's directions. The citing of this section was thus clearly misconstrued and misconceived. The section does not apply to the present circumstances. In any event, there was no application to extend time which was made by the 1st defendant.

The practice and procedure in civil matters in governed by the Civil Procedure Rules, 2017, Order 1 r. 5(d) of those rules provides for expeditious dealing with matters before the courts. Any unwarranted delay is thus supposed to be frowned upon and not to be tolerated. Further, under Order 14 r.2(4), it is mandatory for a Judge to make directions as to the conduct of trial during s scheduling conference. The fact that this is made to be mandatory shows how important directions for conducting trial are to be considered. The directions cannot thus be disregarded at the caprice of Counsel or his clients. It is thus in this regard that Order 14 r.5 provides for "sanctions" for not complying with directions. The actual wording is "effect of non-compliance with directions". The use of the word effect signifies that there is always supposed to be a

consequence for non-compliance with directions. Such consequences include dismissal of a claim, striking out of a defence, orders for costs or any other order deemed fit. It is left to the court to decide which "penalty" to impose after weighing the circumstances of the non-compliance.

In terms of weighing the circumstances of the non-compliance, I believe that the words of Justice Katsala, JA in **Patrick Ngwira and Mr. Chiumia v. Francis Ngwira,** MSCA Civil Appeal Case No. 16 of 2020, at page 34, are quite pertinent and I entirely agree with the sentiments that:

"legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads"

The above sentiments have now been adopted as the official position of the Apex Court in **Standard Bank of Malawi v Maone Oil Mills Limited & 5 others** (MSCA Civil Appeal 94 of 2018) [2024] MWSC 6 (27 February 2024) where the Court observed that;

"The law and practice of this Court is clear enough. Parties seeking audience before it must adhere not only to substantive laws engaged but also its rules of, procedures. There should, in other words, be

adherence not only to substantive justice but also procedural justice."

It was a further observed by the Supreme Court of Appeal that:

"Where however a party seeks to be pardoned for non-adherence and spared sanctions it behoves them to show cause why they should be so forgiven. This invariably involves the offending party showing, on a balance of. 'probabilities, that the noncompliance was in the circumstances for good cause and further that there will be no injustice thereby caused to the innocent party that cannot be cured by an award of costs and more importantly that it is in the interests of justice that the offending party be allowed to further participate in the case the procedural transgression{s} notwithstanding."

From Counsel Mpaka's assertions, I formed the view that he was not speaking for a party that seeks forgiveness for not following the Court's direction. Rather he wants this court to go on a frolic of clarifying and clearly stating the nature of obligations of the parties following a scheduling conference. We will not do that for the answer is a simple one, the obligation is to follow the Court's directions, period! The directions were clear as to what the parties were supposed to do and I do not have to belabour explaining them to Counsel Mpaka, who was in fact counsel in **Standard Bank of Malawi v Maone Oil Mills Limited & 5 others**. To say that Counsel Mpaka should then have known better is an understatement.

Further, following the clear directions of this court, it is NOT true that the claimant would have been at liberty to file a trial bundle without the 1* defendant's witness statement(s) and skeleton arguments. Order 16 r. 1 provides that;

A claimant **shall**, not later than 14 days before the date of the trial, file and serve on

all parties a bundle (the 'Trial Bundle'), containing the following [emphasis mine]

(a) the chronology of events,

(b) the summons;

(c) the defence;

(d) list of authorities,

(e) skeleton arguments;

(f) witness statements;

(g) any directions for particulars of any of the statement of case, and the particulars

filed in response to such a direction,

(h) the third party notice, if any,

(i) any notice claiming contribution or indemnity;

(j) expert reports, including medical reports, if any;

(k) any sworn statement to be used at trial;

(1) any order in the proceeding to add a party; and

(m) any other document agreed by the parties to be included in the Trial Bundle

In my view, there cannot be a Trial Bundle which does not contain the defendant's witness statement and skeleton arguments. Especially in a situation where the defendant clearly indicated an intention to defend the matter. I must thus find Counsel Mpaka's submissions to be cavalier and an attempt to mislead the court.

I must also further state that when giving directions in this matter, there was no intention to hold a pre-trail conference since the same is optional under Order 14 r.4(1). This meant that ascertaining that the parties had complied with the Court's directions did not have to wait till the pre-trial conference as provided for under Order 14 r. 4(2). This is more so that the directions of this Court were very clear and were agreed upon by the parties. Further considering that the 1st defendant is yet to file a witness statement, | must find that this application cannot be said to be premature.

I find it quite absurd for Counsel Mpaka to argue that they cannot file witness statements because there has been a change in personnel at the 2nd defendant's company. Surely if there was indeed such a change in staff, I would think that they would not have taken the company's records, Further, having delayed in filing a witness statement, Counsel then turned around and said that it would have been better if this matter was tried in 2020! That is precisely the point, this matter is now four years old! I do not therefore think that the court

can be asked to indulge Counsel's negligence in not tracking down a witness, which as the record shows, was actually identified in May 2023. Further, I must find it lax for Counsel to simply argue that there has been a change in staff without providing us better particulars! In our view, in as far as Mr. Bauleni remains in Malawi, he could have been easily traced. If indeed there has been a change in staff at the 1st defendant, then that will remain a fact which will not change and I would find that we cannot be waiting for the 1st defendant to find the "appropriate" employee to come and testify in this matter. In any event, as Counsel Machika pointed out, it would seem that Bauleni is still under the employ of the 1st defendant.

Conclusion

From the foregoing, it was never in dispute that the 1st defendant did not comply (and still has not) with the directions of this court to file a witness statement and skeleton arguments. This fact having been established, it was incumbent on the 1st defendant to show cause why its defence and counterclaim should not be struck out and dismissed, respectively. Rather than being contrite and ask for forgiveness as stated by the Supreme Court, Counsel Mpaka elected to be cavalier in his approach.

I must find that it is a sign of lack seriousness for Counsel of Mr. Mpaka's experience at the bar, to argue that at a pre-trial conference **"the court can make up its mind on whether the case can be proved, because he who alleges must prove"**, Cases cannot obviously not be proved at a pre-trial

conference! Such a procedure does not exist in our legal system and this definitely cannot be used as an excuse for not complying with the Court's directions to file a defence. It was also negligent and too nonchalant for Counsel Mpaka to argue that they would have elected not to call witnesses and simply cross-examine the claimant's witnesses. Then why did the defendant indicate that they would defend the matter in the first place?

In the final analysis, I must find that the non-compliance by the 1st defendant was not for a good cause other than perhaps a touch of egotism. This is a 2020 matter as such I must grant the application by the claimant (as supported by the 2nd defendant). As noted by the Justice of Appeal Katsala, this is a case "in which justice will be better served by allowing the
consequences of the negligence of the lawyers to fall on their own heads". I thus proceed to strike out the 1st defendants defence and dismiss its counterclaim with costs to the claimant and the 2nd defendant.

Made in Chambers this...17th day of July...2024.