Mchawa v National Bank of Malawi

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice M. Mtegha
Cause Number:	Civil Cause Number 250 of 1989
Date of Judgment:	June 06, 1991
Bar:	Mr. Ng'ombe, Counsel for the Plaintiff Mr. Mandala, Counsel for the Defendant

This is an unusual case before these courts. The plaintiff brought this action to recover damages for negligence and or breach of contract.

The plaintiff, Tobias Lazaro Mchawa, is a businessman. He has a current account at the defendant Bank, Churchill Road branch, Limbe. The defendant, National Bank of Malawi, (hereinafter referred to as the “bank”) provides the usual banking facilities to its customers. Among such services, the defendant, through its branches, applies for foreign exchange to the Reserve Bank of Malawi on behalf of its customers, on payment of commission by the customers. There is no dispute at all that such relationship existed between the plaintiff and the

defendant and a relationship of principal and agent was created thereby.

The plaintiff pleads that under and by virtue of this agency agreement, the defendant, on the instructions of the plaintiff as its principal, applied to the Reserve Bank of Malawi for an approval from the Reserve Bank, through the services of the defendant, to pay certain sums of money to Kenya where his son was to study at an institution of learning. Accordingly, the defendant did get approval from the Reserve Bank and the defendant remitted the money to the institution in Nairobi, Kenya. The arrangement worked perfectly well between May 1987 and April 1988, when the defendant, for no apparent reason, defaulted or omitted to remit an approved sum of KSh11 000-00 towards tuition and examination fees to the institution. As a result, the son was expelled from school. He is, therefore, claiming for all the monies he expended on the son up to that time. The defendant denies this claim, saying, inter alia, it was not negligent, and that it never breached any agreement at all.

It was the plaintiff's case that in 1986 he decided to send his son, Jeffrey Mchawa, to Nairobi, Kenya, to study at a Computer Training Centre (the centre) for a Diploma in Computer Programming. An invoice in the sum of Kenya Shillings (KSh) 67 200-00 was sent to him. He then applied to the Reserve Bank, through the bank, for approval to remit the sum of KSh67 200-00. The bank duly applied to the Reserve Bank on his behalf and on 12 June 1987, the bank duly advised the plaintiff that only a sum of KSh44 700-00 was approved instead of KSh67 200-00, and requested the plaintiff to furnish the bank with remittance instructions. These were given and the bank carried out the instructions and remitted the funds to Nairobi.

According to the plaintiff, there was some change in the organisation of the course and Jeffrey was required to be there for another four months. Accordingly, he applied for foreign exchange though the bank in the sum of KSh29-900-00 on 29 December 1987. The defendant, as usual, applied to the Reserve Bank on behalf of the plaintiff. On 2 February 1988 the bank, in a letter addressed to the plaintiff, advised as follows:

"We are pleased to advise that the above application has been approved in the amount of KSh11 000-00 for fees. Other expenses should be met with funds remitted for maintenance. Please furnish us with your remittance instructions."

According to the invoice advising the plaintiff that KSh29 900-00 was needed, part of this was examination fees, and that the closing date by which examination fees were to be paid was 26 April 1988. According to the plaintiff, when he was advised that only KSH11 000-00 has been approved, he instructed the bank to remit KSh6 000-00 on 15 April 1988, but, without explanation, only KSh1 835-00 was remitted. As a result, Jeffrey was withdrawn from the Centre in Nairobi. The plaintiff then wrote to the bank on 31 May 1988 in these terms:

"Dear Sir,

RE: WITHDRAWN OF SCHOLARSHIP FOR JEFFREY T NCHAWA EC 2175/88

I wish to refer to my remittance instructions to remit KSh 6 000-00 to School of Computer Training Centre, PO Box 22463, Nairobi, Kenya of 15 April which was Friday. This money was to meet examination fees which enrolling date was expiring by 26 April 1988.

In the above transaction only KSh1 835-00 was remitted without explanation to me whatsoever, neither was any particular reason given in the absence of KSh6 000-00 which was my remittance instructions nor a formative advice given to say only KSh1 835-00 was remitted. Until 28 April I had a telephone from Kenya advising me only KSh1 835-00 being money received from my bankers in Malawi.

When I called in the office of your Mr Matikanya I was advised that my approval got expired, but when I produced my copy of approval letter it was confirmed that my approval was valid and that efforts would be made to send the money, until 5 May 1988 the money was sent to Kenya only to find that it was impossible for him to be considered to sit for exams and that he was served with a withdrawal letter.

In the light of the above transaction my son is withdrawn from the Computer Training School NOT because of my own making, now he arrived last week Friday after spending almost one year studying computer but not sitting for one of UK

University Diploma Exams and hereby seek for reasonal advice as to what can be the solution of the fate of my son."

It would appear that no reply was received from this letter, and on 9 June 1988 the plaintiff wrote to the Chief Executive of the bank at the Head Office in these terms:

"Dear Sir,

RE: WITHDRAWAL OF SCHOLARSHIP FOR JEFFREY T MCHAWA EC 2175/88

I refer to my letter dated 31 May 1988 to The Manager of Churchill Road branch: herein a photocopy of the letter enclosed.

As can be seen from this letter now I want to make it clear that am claiming for damages of costs from my bankers. These costs includes all monies spent on this boy including air fares to and from Kenya for one year spent in Kenya.

I should only be grateful if at all you would be so kind as to assist me in this matter before I hand over the matter to my lawyers for recovery of the

damages.”

After this letter the bank replied him on 16 June 1988 in these terms:

“Dear Sir,

ATTENTION: MR TL MCHAWA

EXCHANGE CONTROL: WITHDRAWAL OF SCHOLARSHIP FOR JT MCHAWA

We refer to your letter dated 31st May 1988 and regret to learn that your son has been withdrawn from the Computer Training, Nairobi, Kenya on the 15th April 1988.

Whilst we sympathise with you, we would like to mention that the bank tried the best to remit the funds to the Computer Centre’s bankers. The remittance of KSh1 835-00 was the final remittance to authority No. EC856/87 which was in current existence.

The remittance of KSh5 000-00 was the first on authority No. EC2175/87 which went on the 5th May 1988 by telex.

As your son is now withdrawn from the Centre, whilst the money is still with them, we suggest if you could contact the Centre to advise you of the fate of your son.

Kindly note that the approved balance on EC2175/87 was KSh11 000-00 and the expiry date of the remittance is 18th July 1988. You remitted KSh 5 000-00 and remains the balance of KSh6 000-00.

We attach copies of our telex between ourselves and the agents in Kenya and note that the Bankers in Kenya confirmed receipt of funds on 6th May 1988.

Yours faithfully,"

The plaintiff replied to this letter on 7 July 1988. The letter, Exhibit 11 states:

"Dear Sir,

EXCHANGE CONTROL – WITHDRAWAL OF SCHOLARSHIP FOR JT MCHAWA

I refer to your letter dated the 16th June 1988 and wish to make the following observations.

I instructed you to remit KSh5 000-00 to Computer Training Centre, Kenya on 15 April 1988. You did not remit the said amount instead you remitted KSh1 835-00.

By paragraph two of your letter the KSh1 835-00 was the final remittance to authority No. 856/87. This is not true because by the time I instructed you on the remittance of KSh5 000-00 there was in current existence as well authority for such remission by virtue of EC No. 2175/87 communicated to me by you in a letter of 2nd February 1988.

Your remittance of KSh5 000-00 on a later date, namely 5th May, 1988 was not made in compliance with my instructions to you as a result there was a delay in the remittance of such fund. Following this delay the scholarship for my son at Computer Training Centre was withdrawn because the money reached the Computer Training Centre long after the deadline for payment of enrolment for

examination fee had passed.

On these basis I hold you responsible for the delay of the examination enrolment fee which has led to the withdrawing of the said scholarship. I therefore, claim for the refund of all money spent by virtue of the said scholarship together with any other loss incurred in respect of the same.

Yours faithfully,”

After two reminders, the Bank answered him on 29 July 1988. The bank stated:

“Dear Sir,

EXCHANGE CONTROL

WITHDRAW OF SCHOLARSHIP FOR JT MCHAWA

We refer to your previous correspondence, resting with your chaser dated 26th July 1988. The delay is regretted as the matter was being investigated, as you were advised accordingly.

In examining the information on file, we observed that the funds forming the subject of this correspondence should have reached the College's Bankers in Nairobi, Kenya by 8th May 1988. A telex to confirm remittance of the funds before that date was sent to the Principal on 4th May 1988 and following your further enquiries, it was confirmed to you that the funds telexed to Nairobi, Kenya on 5th May 1988 were credited to the College's account on 6th May 1988 with Standard Chartered Bank, Nairobi, which we strongly feel was effected two days before the deadline if anything. Unless there were other problems compounding the situation that would have precluded the College or otherwise not to believe their Banker's advice, definitely this is beyond our comprehension.

When the application for KS29 900-00 was submitted in December 1987 the Reserve Bank of Malawi only approved KSh11 000-00 for fees, stating that the other expenses were to be met with funds they had previously approved for maintenance at KSh2 000-00 per month, and one of the expenditure on that school invoice was for examination fees, which regrettably has become a subject of this correspondence. From our records, may be this may not be so relevant to you, but we feel it is, apart from the KSh2 000-00 maintenance allowance, the school fees amounts were not being remitted in one approved amount but in parts, as and when you felt appropriate. May be had those amounts been remitted after being advised of the approval, this predicament would not have arisen.

We enclose the relevant photocopies of the messages for ease of reference to which you will confirm that we did everything in our power to salvage the situation.

We trust the matter has been clarified to enable you take up the matter with the College, and should you need further information, please do not hesitate to contact us."

It was the plaintiff's evidence that the bank clearly knew why Jeffrey was returned from Nairobi. Faced with this problem, he went to see the Chief Executive of the defendant, who assured him that the bank would assist, but nothing happened. It was further his evidence that he had instructed them to remit funds on 15 April 1988, but they did not do so until 5 May 1988, when the boy was returned. As a result, he has suffered damage. He is claiming, therefore, all monies that he spent on the boy, that is KSh67 270-00 as air fares, communication services through DHL courier services – K500-00 and bank charges of K600-00 and produced in court a number of remittance slips to Kenya as well as air fare receipts. According to my calculations from the Exhibits, the total remittances to the Centre and to Jeffrey amounted to KSh71 669-00, representing K10 431-75. Again, according to the Exhibits which are before me, a sum of K1 260-50 represents air fares. Again, the total amount of commissions and other charges paid to the bank amount to K96-35. The amount represented by DHL amounts to K62-00. The grand total of the bank charges and commission, on the Exhibits which I have before me, amount to K379-27, and the whole amount comes to K10 873-02. This was the case for the plaintiff.

The defendant called two witnesses. The first one was Grey Ben Matikanya. It was his evidence that during the relevant period he was a bank supervisor stationed at the defendant's Churchill Road branch. His duties, inter alia, encompassed foreign exchange. As such, he met the plaintiff on several occasions, since he used to remit funds to Nairobi for his son's education. He informed the court that the procedure when applying for foreign exchange was that the customer produces an original invoice. This invoice, together with forms, is forwarded by the bank to the Reserve Bank who scrutinise the application. If the Reserve Bank approves, the customer is informed, and on the authority of the customer, in this case the plaintiff, the remittance is made to the beneficiary by telex.

It was his evidence that at first KSh67 000-00 was applied for, but the Reserve Bank only granted KSh44 700-00 and this money was sent to the Computer Centre in Nairobi. Again, KSh29 900-00 was applied for, but only KSh11 000-00 was approved by the Reserve Bank, and the plaintiff was informed that KSh11 000-00 was to be used for school fees only, and the rest on invoice should be met from maintenance which the Reserve Bank approved at KSh2 000-00 per month for one year. Accordingly, KSh1 835-00 was remitted on 15 April 1988 – this was a balance from the KSh44 700-00 approved earlier. Then, on 27 April 1988, they remitted KSh5 000-00. According to the witness, the plaintiff complained that his son was withdrawn for non-payment of examination fees, then he complained to their Head Office.

In cross-examination, the witness admitted that, indeed, when they remitted the sum of KSh1 835-00 they had omitted to spot that there was another approval in the sum of KSh11 000-00; and that the instructions given on 15 April 1988 were not carried out until 5 May 1988, when it was too late.

It was the evidence of the second witness for the defendant, Andrew William Mwawa, that in 1988 he was assistant administration manager based at the Head Office of the defendant. His duties were to assist the administration manager in matters of administration. In the course of his duties, he met the plaintiff who complained about failure by the Churchill Road branch to remit funds to his son, and he was therefore claiming from the bank K19 000-00. Initially, a Mr Humphrey handled the matter, but later he handled it himself. At that time the bank agreed that the bank would send his son back to Nairobi, but on 19 October 1988 the plaintiff came to see him and indicated that his son was no longer interested to return to Nairobi because he had got another scholarship to India. The bank was surprised and the witness was instructed to hand the matter to the bank's lawyers.

This then is the evidence before me. It is quite clear that there was no negligence or breach of agreement between the defendant's bank and the plaintiff in relation to all the transactions except the transaction relating to the KSh11 000-00. In all prior transactions the plaintiff's instructions were being carried out satisfactorily.

However, the position is not the same in relation to the last approval of KSh11 000-00. It is quite clear, on the evidence, and the defendant agrees, that they did omit to remit the sum of KSh5 000-00 which the plaintiff instructed them to do on 15 April 1988. They only did so on 5 May 1988, three weeks later, after the son had returned from Kenya, and only after the plaintiff had complained. There was, therefore, negligence which resulted in breach of agreement.

Mr Mandala, on behalf of the defendant, has submitted that this Court has to decide, in the first place, whether there was a breach of contract through negligence. In the second place, the court has to decide whether the expulsion was due to the negligence. In the third place, the court has to decide whether the damages are too remote. In the fourth place, the court has to decide whether the plaintiff had mitigated his loss. I have already answered the first submission, that indeed there was a breach of the contract through negligence.

As far as the second submission is concerned, Mr Mandala submitted that since the reason for his son's expulsion was obtained by telephone from the school, it is hearsay to say that his son was expelled because of failure by the bank to remit the fees in time. As such, no reason was given for such expulsion, and if it was failure to send examination fees, the KSh11 000-00 out of which KSh5 000-00 was sent, was not for examination fees as that had to be met from the monthly amount of KSh2 000-00; therefore the son's expulsion cannot be attributed to the defendant's negligence.

Mr Ng’ombe has submitted, however, that all along the defendants knew the reason why the son could not complete his course – it was the negligence of the defendants.

What is hearsay and what is not hearsay was considered in the classic case of Subramaniam v Public Prosecutor [1956] 1 WLR 965. At 970 in the report it is stated:

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made ...”

What is the position in this case? It is correct that the plaintiff said he was told by the Centre that his son had been expelled because he failed to pay examination fees. If the plaintiff would like me to believe the truth of this statement, then it is hearsay. But this is not the matter. Throughout the trial, the defendant agreed and accepted that the son was expelled because the fees were not paid in time. I hold as a fact that the son was expelled from Nairobi because the fees were not paid in time. It has been argued that the defendant bank was required to send

boarding fees and not examination fees because examination fees were to be met from monthly remittances. I do not think this really mattered. It the KSh5 000-00 were to be sent on time, the Centre would have known that part of the funds would be utilised for examination fees.

So far I have held that the contract was breached because of negligence on the part of the defendant and as a result the son was expelled from the Centre in Nairobi and he failed to write his examination. He has therefore suffered damages. Mr Mandala has submitted that even if I do so find, were the damages reasonably in contemplation of the parties? He submits that the expenses which the plaintiff made were not damages which the parties contemplated when they were entering into this contract, because, if there was not any breach of contract, Mr Mandala contends, these expenses would all the same have been incurred. Therefore these damages were too remote and not recoverable.

It was Mr Ng'ombe's submission that the damages were not too remote. The damages were the actual loss suffered by the plaintiff on his son. It was his submission that the bank knew very well that the plaintiff was remitting his money to his son for a course and if the bank failed to do so, his son would be expelled; the bank must, therefore, have contemplated this damage.

The question of remoteness of damage was considered in the case of Hadley v Bexendale (1854) 9 Ex 341; 156 ER 145. Alderson B, delivering the judgment of the court, said this:

"We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is according to the course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant and thus known to both parties, the damage resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally ... For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to damages in the case ..."

This rule was restated in Victoria Laundry (Windsor) Ltd v Newman Industries [1949] 2 KB 528 and again qualified in Koufos v Czarnikow Ltd [1969] 1 AC 350. What has finally emerged from these cases is that where there is a breach of contract, the aggrieved party is only entitled to recover such part of the damages actually resulting as was at the time of contract reasonably foreseeable to result from the breach. What was "reasonably foreseeable" depends on the knowledge

possessed by the parties, and the knowledge possessed by the party who commits the breach may be imputed, since a reasonable person is taken to know the ordinary course of things. The knowledge may be also actual, which the person who commits the breach actually possesses.

It is Mr Mandala's submission that these expenses which were incurred were not damages that the parties contemplated when they were entering into the contract. On the other hand, Mr Ng'ombe submitted that the defendant knew or ought to have known that failure to remit the examination fees would mean that the son would not write the examination and therefore all the monies expended on the son would have been wasted.

Mr Mandala further submitted that the plaintiff cannot succeed because the damages are speculative – The Parama (1877) 2 PD 118. He says that the damage suffered by the plaintiff is that the son failed to write the examination, but there were two things which could have happened if the defendant did not breach the contract: the son could pass or fail the examination.

It is my considered view that the defendant should have known that breach of the contract to remit the funds to the college would cause damage and the damage would be that the son would either starve or be expelled from the college. This, surely, should have been known by the defendant, and if the son was expelled, it naturally follows that all the monies spent by the plaintiff before the breach would have been wasted, and, naturally, those monies properly expended would be recoverable. This proposition might be very well true in tort.

But in contract would it be said that the plaintiff in this case has suffered pecuniary loss? McGregor on Damages (13 ed) at 910 has this to say:

"But if the principal could have derived no benefit in the law from the required contract even had the agent carried out his instructions, as where the contract would not have been enforceable against the third party because it is in some way vitiated, or, though enforceable, would not have given the plaintiff any pecuniary benefit by reason of third party's insolvency, no damages will be recoverable from the agent."

The question which I have to ask myself is what pecuniary benefit would the plaintiff have benefitted had the defendant actually performed the contract? The answer is clear that the plaintiff could not have derived any pecuniary benefit from such performance by the defendant. The damages are therefore not recoverable. However, even if the damages were recoverable, I do not think the plaintiff could have recovered all of them as pleaded because of the application of the rule of mitigation. The rule is that there is no recovery for loss which the plaintiff ought to have avoided as Viscount Haldane LC said in British Westinghouse Electric and Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd [1912] AC 673 at 682:

"The fundamental basis is the compensation for pecuniary loss naturally flowing from the breach, but this first principles is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the

damage which is due to his neglect to take such step."

In the instant case, once the defendant realised that it had committed a breach by failing to remit the funds to Kenya soon after the plaintiff instructed it on 15 April 1988, and the defendant was told that the son had been returned to Malawi, the defendant offered to send the son back to Kenya at their expense to enable him to write his examination. The plaintiff turned this offer down because, according to the plaintiff, the son was no longer interested to go to Kenya. Had the son gone to Kenya, the plaintiff would have mitigated his loss. His loss would have been much less, if any, than what he is claiming now.

I have held that these damages are not recoverable. Which are these damages, bearing in mind there were two sets of approval from the Reserve Bank? The first one was for KSh44 700-00. These funds were properly remitted. Then there was the KSh11 000-00 out of which KSH5 000-00 was remitted, after the breach. This latter amount is still in Kenya. The defendant, as the plaintiff's agent, should have called for these funds from the Centre. This amount is clearly recoverable. The plaintiff, although he has succeeded in establishing breach of the contract, has failed to establish damages, except the KSh5 000-00, which I do award. I also award three quarters of the total combined costs of this action to the plaintiff.