

Malawi Distilleries Ltd v Sichilima Civil Cause Number 2869 of 2002

Court:	High Court of Malawi
Registry:	Principal Registry
Bench:	Honourable Justice Chimasula Phiri
Cause Number:	Civil Cause Number 2869 of 2002
Date of Judgment:	August 19, 2005
Bar:	Mr. Makhambura, Counsel for the Plaintiff Mr. C. Kalua, Counsel for the Defendant

Head Notes

Commercial Law - Sale of Goods - Debt - Action for price - Standard of proof - Action for K4.4m was dismissed.

Civil Procedure - Remedies - Set-off - Defendant entitled to a set-off to extinguish the plaintiff's claim

Law Of Evidence - Standard of proof - Civil cases - Balance of probabilities.

Commercial Law - Interest - Unliquidated sum - Court declines to award interest where not agreed by parties

Damages - Civil cases - Set-off - Defendant is the overall winner and entitled to costs for the counterclaim

Summary

The Plaintiff instituted a claim in the High Court, Principal Registry, against the Defendant for the sum of K4,413,056.60, representing the purchase price of goods sold. The Plaintiff also sought interest and collection costs. The Defendant denied the claim, asserting that he had fully paid for the goods and, in a counterclaim, demanded restitution of K11,320,984.80, which he alleged was an overpayment to the Plaintiff. The Defendant contended that his payments, made by direct deposits into the Plaintiff's bank account, were not properly captured in the Plaintiff's head office statements, thereby creating the false impression that he was indebted to the Plaintiff when, in fact, the reverse was true

The primary legal issues for the Court were to determine whether the Plaintiff had successfully proved its claim and whether the Defendant had substantiated his counterclaim and was entitled to a set-off. The Court found that the Plaintiff had failed to prove its claim. The Court held that the Defendant's counterclaim succeeded to the extent that it demonstrated the Defendant had overpaid the Plaintiff. It was the Court's decisive reasoning that the Plaintiff's own poor recording and accounting system was responsible for the dispute. Consequently, the Plaintiff's claim was dismissed, and the Defendant's counterclaim was allowed. The Court declined to award interest on the overpaid amount, deeming it unconscionable to add interest to a figure it already considered to be in excess of the appropriate sum. The Plaintiff was condemned to pay the costs of the counterclaim, which were to be taxed if an agreement could not be reached.

Legislation Construed

N/A

Judgment

1. FACTUAL BACKGROUND

The plaintiff's claim is for the sum of K4,413,056.60 being the purchase price of various goods sold to the defendant by the plaintiff. The plaintiff also claims interest and collection costs of K794,350.19. The defendant denies being indebted to the plaintiff. He contends that he fully paid for the goods he bought from the plaintiff. In his counterclaim he claims from the plaintiff the sum of K11,320,984.80 being the aggregate amount for the over payments he effected into the plaintiff's bank account.

2. PLEADINGS

To understand the parties' claims herein it is important to capture their pleadings.

2.1. PLAINTIFF'S STATEMENT OF CLAIM

The plaintiff's statement of claim is concise. It states as follows:

(i). "The plaintiff's claim is for the sum of K4, 423,056.60 being the purchase price of various goods sold to the defendant by the plaintiff at the defendant's own request particulars whereof are already known to the defendant.

(ii) The plaintiff also claims interest thereon at the prevailing bank lending rate.

(iii) The plaintiff also claims collection costs so far amounting to K794,350.19

(iv) Costs of this action.

2.2 RE AMENDED DEFENCE AND COUNTERCLAIM

The defendant on the other hand, pleads as follows:

1. "The defendant admits that, sometime in 2000 to September 2002, he maintained a trading account with the plaintiff which was served by direct payments and by transfer payments made through National Bank of Malawi Karonga Branch.

2. In so far as its trading account was affected by transferring from the said bank, it was an implied term of the arrangement that, in receiving the deposits the said National Bank Karonga Branch, acted as an agent for the plaintiff.

3. The defendant avers that it was custom of the said branch of National Bank, as the plaintiff well knew, that once the moneys were received into the plaintiff's account at Karonga Branch aforesaid, the same was money had and received by the plaintiff who controlled and transferred it as it chose.

4. The defendant pleads that from time to time the moneys deposited in the plaintiff's account at Karonga Branch aforesaid were transferred to the plaintiff's Account in Blantyre as and when the plaintiff directed.

5. Consequently the defendant contends that, as soon as he deposited moneys into the plaintiff's account at Karonga Branch, the said deposits were deemed to have been paid to the plaintiff notwithstanding that, the same or part of it may not have been captured as payments in the plaintiff's Statement of Account maintained at its Head Office in Blantyre.

6. The defendant states that the trading transactions do not warrant an entitlement to the sum of K4,413,056.60 as claimed by the plaintiff or at all.

7. In the event the defendant is held liable to the plaintiff for the sum claimed by the plaintiff herein, the defendant pleads set-off in extinction of the plaintiff's claim.

8. Save as herein before expressly admitted the defendant denies each and every allegation contained in the plaintiff's Statement of Claim as though the same had been set out and traversed seriatim.

COUNTERCLAIM

9. The defendant repeats paragraph 2 and 5 of the defence and says that, in so far as the moneys were deposited with National Bank Karonga Branch aforesaid, the plaintiff effectively had paid all the amounts deposited into the said account notwithstanding that, the same were not captured on the plaintiff's statement of account.

10. The defendant says that during the accounting period the plaintiff knowingly passed unjustified debit entries and/or failed to credit the said account with payment made by the defendant, thereby creating impression that, the defendant owed money, when in truth, there were overpayment on the said account.

PARTICULARS OF FALSE ENTRIES

(i). 22/02/02 by false debit undelivered goods reflected on invoice

LL 1N002432 K1,951,241.40

6/10/00 by credits uncounted for to 27/09/02 K13,383,000.00

K15,334,241.40

11. The defendant will contend at the trial that, the plaintiff knew or ought to have known that, by close or business on 27th September 2002, the defendant had overpaid the said account to the tune of K11,320,984.80 which ought to be refunded by the plaintiff.

12. Furthermore, the plaintiff avers that, the excess amount pleaded in the preceding paragraph are moneys had and received by the plaintiff for consideration that entirely failed.

13. By reason of the matters aforesaid, the defendant says that, he is entitled to restitution of the excess amount with interest at current bank lending rate compounded and calculated according to Bank practice and custom or at such rate that, the court may deem fit, on the footing that the moneys were retained by a commercial concern over a commercial transaction.

14. Therefore the defendant counterclaims:

(a). K11,320, 984.80

(b). Interest on (a) above as pleaded in paragraph 12 and 13 hereof

(c). Costs of the action

ISSUES

Basically on the pleadings the issue to be determined by the Court is whether on the evidence the plaintiff's claim for K4413,056.60 has been proved. Secondly, whether the defendant has proved his counter-claim for K15,334,241.40 and be entitled to set-off of the plaintiff's claim.

EVIDENTIAL BURDEN AND STANDARD OF PROOF

Burden of Proof

The burden of proof tests upon the party (the plaintiff or the defendant) who substantially, asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever. See ***Joseph Constantine steamship Line v Imperial Smelting Corporation Limited*** [1942] AC 154 at p174.

Standard of Proof

The standard required in civil cases is generally expressed as proof on a balance of probabilities. "If the evidence is such that the tribunal can say: we think it is more probable than not the burden is discharged, but if the probabilities are equal it is not." Per Denning J in **Miller v Minister of Pensions** [1947] All E.R. 372 at pp 373/374.

THE EVIDENCE

In support of its claim the plaintiff called Mr Chipso Samuel Vinkhumbo to testify on its behalf. He is the plaintiff's Financial Controller. His evidence was that the defendant bought goods from any of the plaintiff's selling points but mainly from their Lilongwe branch. He stated that initially the defendant used to buy goods on cash basis. In about 2000, the defendant approached the plaintiff for credit facility which was granted. It was his evidence that the defendant was collecting goods on credit and depositing lump sums of money to the plaintiff's bank account. He further stated that the defendant's account was updated with credits from bank statements which could come several weeks after deposits were made. Sometimes payments could instantly be posted to the account using deposit slips faxed to the plaintiff's head office by the defendant. He went on to state that posting using faxed deposit slips sometimes created a situation where a payment recording date preceded the actual deposit date because the computer system was backdated to match with period dates when the majority of the transactions were to be captured. He furthermore testified that sometime in October 2001 the defendant backslided in advancing the payments towards his account such that the plaintiff decided to temporarily suspend his account. Then the defendant decided to go into a secret arrangement with the plaintiff's Sales Manager, Mr Dziko at Lilongwe branch to deposit direct to his account for cash

purchases which he did on two occasions. He tendered in evidence exhibit "P2" which showed all transactions captured against the defendant's account. This showed that the defendant owed the plaintiff the sum of K4,013,056.60. He also tendered in evidence exhibit "P7" being invoice number LLIN002432 for the sum of K1,951,241.40 which the defendant disputed as being unauthentic. In cross examination "PW1" clarified that when he stated in examination-in-chief that posting using faxed deposit slips sometimes created a situation where a payment recording preceded the actual deposit date he did not mean that a posting would be done before depositing. He said he would get the figure from the deposit slips which would then be posted. He emphasised that it is not possible to post an entry before deposit is made.

He was then shown exhibit "D2, N(0)" being a deposit slip dated 2nd October 2000 for K2,170,000.00. The amount was not shown on exhibit "P2". In explanation he said this was reflected in the September, 2000 account. He was shown other deposit slips whose figures were not reflected in exhibit "P2". These being:

(i). D2, N1 for K684,000.00 deposited on 6th October 2000

(ii). D2, N2 for K946,000.00

(iii). D2, N5 for K525,600.00 deposited on 10th November. He said this reflected on page 1 of exhibit "P2" reflecting deposit date of 27th October 2000.

(iv). D6, N6 for K504,800.00 made on 13th November 2000. He said this appeared on "P2" but not as a separate statement.

(v). D6, N7 for K503,800.00 made on 13th November 2000. He said it did not appear in "P2" as a separate figure.

(vi). D2, 7 for K700,000.00

(vii). D2, 8 for K353,000.00

(viii). D2, 9 for K324,050.00

(ix). D2, 19 for K1,000,000.00

(x). D2, 23 for K611,000.00

(xi). D2, 24 for K1,172,850.00 deposited on 28th August 2001. He said it appeared on "P2" as having been deposited on 24th August 2001.

(xii). D2, 34 for K250,500.00 deposited on 31st October 2001. He said this appeared on "P2" as having been deposited 26th October 2001.

(xiii). D2, 35 for K1,009,500.00 deposited on 31st October 2001. He said this appeared as a combination

(xiv). D2 36 for K400,000.00 he said it appeared on "P2" without elaboration.

(xv). D2, 40 for K537,900.00 deposited on 24th December 2001. He said it appeared as an entry made on 21st December 2001

(xvi). D2, 42 for K1,000,000.00 deposited on 17th January 2002. He said it appeared on "P2" dated 25th March, 2002. He said the capturing might have delayed.

(xvii). D2, for K690,000.00 deposited on 16th April 2002. He said this appeared in "P2" at page 7 not as single entry.

The witness was able to point at some entries which appeared in "P2" with exact entries appearing on deposit slips. These were for instance exhibits D2, N1 for K684,000.00, D2 N8 -N17; D2 N1 - 6, D2, N20 - 22 etc.

In further cross examination the witness stated that the account number in which the defendant's deposits were being made was for the plaintiff and that if a customer deposited into it in Karonga the money would find its way into this account. He further stated that payment paid by the defendant was acknowledged by Bank deposit slip and bank statement. He would know how much was deposited and the date of the deposit if the deposit slip was faxed to the defendant.

As regards invoices issued to the customers, he said that on each transaction there would be 3 copies in three colours; white for the customer pink and green for the depot and the head office. He was able to identify in exhibits D1, D1B, D1(d) that each invoice had a security check stamp and was signed for by the security guard and the customer. In being shown exhibit D4 a(i), (ii) and (iii) being invoice number LLIN002432 he confirmed that it was a complete invoice in the three colours white, pink and green. All had not been signed for by the customer.

He confirmed that exhibit "P7A" being a pink copy bore the same number as exhibits D4(a)(i), (ii) and (iii). Thus instead of 3 there were 4 copies. He said it would be unusual to have 4 copies if they were all issued from the same computer. The witness was able to identify that transaction in the sum of K1,951,241.40 relating to exhibit D4(i), (ii), (iii) [P7A] had been captured at page 6 of exhibit "P2". The amount therefore formed part of the plaintiff's claim of K4,013,056.60 which if disallowed

would lower the plaintiff's claim. "PW1" was further able to see that the same amount of K1, 951,241.00 reflected under invoice number 2256.

In re examination "PW1" stated that certain transactions appeared on dates earlier than deposit "for the sake of assisting the customer" For instance exhibit D2 N(o) for K2,170,000 was captured in the September, 2000 account even though the deposit actually was done in October 2000. This was done "because the customer wanted to know the balance and wanted to be assisted". He went to explain that all the figures which the defendant claimed had not been captured in page 2 were in actual fact captured bearing different dates on the basis of the computer explanation.

On "D4A (i), (ii) and (iii) and "P7A" bearing the same invoice number and having 4 copies he said he suspected collusion. He said it was possible to print out as many computer prints as one wants. He said the invoice is signed when one is collecting the goods. He said since "P7A" was signed it was a good claim against the defendant. "PW1" said he had no knowledge of "D4A (i), (ii) and (iii) but agreed to have visited the defendant in Karonga. This constituted all of the plaintiff's evidence in support of its claim.

DEFENDANTS EVIDENCE

In defence and support of his counterclaim the defendant called two witnesses.

JOHN SICHILIMA

“DW1” was John Sichilima, the defendant. He testified that he had for 5 years transacted business with the plaintiff through a trading account. The account was mostly serviced by transfer of payments made through Karonga Branch of National Bank of Malawi. He testified that each time he made the said deposits, the plaintiff’s account number 0141005153400 was credited. The plaintiff was advised of the payments through copy of deposit slips which were sent to its offices in Lilongwe and Blantyre.

He further testified that sometime in 2001 Mr Nkhwazi, an employee of the plaintiff based in Lilongwe had been relieved of his post as a salesman and replaced by Mr Dziko. The said Mr Dziko carried a reconciliation of the defendant’s account and produced a statement which reflected that the defendant owed the plaintiff the sum of K723,541.69. though the defendant did not agree with the statement he nevertheless effected further payments in the sum of K1,123,600.00 upon his request the plaintiff gave him a statement exhibited as “D4”.

He furthermore testified that on two occasions he was paid surprise visits by Mr Vinkhumbo, an employee of the plaintiff. On first occasion the said Mr Vinkhumbo asked for the defendant’s deposit slips which he refused to give to him. On the second occasion Mr Vinkhumbo brought a set of invoices of goods for the defendant to sign. He declined to do so. The invoices were left with the defendant. These were tendered in evidence as exhibit “D4A(i), (ii) and (iii).

It was “DW1” further testimony that after inspecting the statement produced by the plaintiff, he discovered that a number of payments which had been deposited through Karonga Branch of National Bank of Malawi had not been captured on the statement. He also noted that the value for undelivered goods in the sum of K1,951,241.40 was debited on it. He consequently caused a statement to be prepared showing the credit and debit entries separately. He then added up the amounts effected through debit slips which had not been captured. The composite of the uncaptured amounts being K13,383,000.00 is reflected in exhibit “D5A”. Taking into account what was reflected as his debit balance upon adding the credit and debit entries through exhibit “D5”, the value for undelivered goods and the composite of the uncaptured sums “DW1” testified that he had overpaid the plaintiff in the sum of K11,320,984.80.

In cross-examination he emphasised that the statement exhibited as “D3” was prepared by Mr Dziko as it was Mr Dziko who gave it to him. He said he got D3” from Mr Dziko at his office. He said he did not enquire about “D3” because it was corresponding with the information he had. He said he couldn’t quite remember the exact date when “D3” was produced though he was with Mr Dziko in the office.

On being shown exhibit “D4A” the witness narrated the process that they went through when buying goods from the plaintiff. He said once goods were loaded before they came out the invoice would be brought to the watchman at the gate who stamped and signed it, the driver would also sign for it and the goods would come out. “DW1” was unshaken in his evidence that exhibit “D4A”(i), (ii) and (iii) was brought to him by Mr Vinkhumbo who forced him to sign for them but he refused.

In reference to exhibit "P7A" he said it showed that it had been signed for but he could not identify the signature on it. He said "P7" was a copy of the unsigned invoice that was brought to him by Mr Vinkhumbo. He stated that the amount of on "P7" could reflect that the goods were collected but was quick to add that the invoice number for "P7A" came to him unsigned. He said in as far as he could remember goods for invoice exhibited as "D4A(i), (ii) (iii) were not collected. In reference to exhibit "D5A" he said it captured sums of money banked but not captured in the statement of the plaintiff, being exhibit "P2". The witness was then shown figures in exhibit "P2" which corresponded with some of the figures shown in "D5A". He said even though the amounts were the same the dates to which the transactions related were different.

In re-examination he restated that the invoice "D5A(i), (ii) and (iii)" came to him with Mr Vinkhumbo and that he could not have printed similar documents from a computer because he did not have a computer and did not know how to use it. In reference to "P7A" he said it only had one signature yet an invoice ought to have two signatures on it, one for the guard and another for the driver. This to him showed that the goods were not collected. He said the signature in "P7A" was a forgery.

On the exhibits "D5A" and "P2" he said even though he was shown figures in "P2" which corresponded with figures in "D5A" the dates were not the same on the two documents.

THOM BLAIR MWALILINO

"DW2" was Thom Blair Mwalilino. He is the driver for the defendant.

He testified that as part of his job, in the course of business, he is expected to sign delivery notes for goods received and collected from the plaintiff on three forms bearing the same number but in different colours.

He testified that the signature appearing in exhibit "D7A" being delivery note number LLIN002434 was not his and that the goods described therein were never collected by him. He said he first saw the delivery note in the courtroom and suspected that the copy was not genuine since they already had the unsigned copy bearing the same number. He further testified that upon seeing the delivery note he arranged for a handwriting expert to disprove the signature appearing on the purported delivery note. He exhibited the findings of the expert in exhibit "D6(c)" which findings were that the questioned signature has features which do not correspond with the handwriting of "DW2" and that it was the expert opinion that the signature was a simulated forgery.

In cross examination he said he first saw the document in Mr Bazuka Mhango's office. That the signature on the document was not his. That he actually went to see the signature expert in Lilongwe and left the specimen signatures there. He said he went to Lilongwe with a Mr Chirwa who carried some documents which were handed over to the signature expert.

APPLICABLE LAW

By section 28 of the Sale of Goods Act, it is the duty of the Seller to deliver the goods and the buyer to accept and pay for them. The defendant in the present case had a duty to pay for the goods he purchased from the plaintiff.

The claim by the plaintiff is for the sum of K4,013,056.60. As is evident from exhibit "P2" the claimed sum has built in it the sum of K1,952,241.40. This amount is contained in invoice number LLIN2434.

Evidence was adduced in court that for every sale transaction three copies of an invoice were printed by the defendant. Before the goods were collected the security guard was required to stamp them, sign on them and the customer was to countersign the invoice. Exhibits D1, D1(b), D1(c) and D1(d) confirmed this position. Even "PW1" confirmed this.

In respect of invoice number LLIN002434, the plaintiff adduced exhibit "P7A" to prove that the defendant actually collected the goods the value of which was reflected on that invoice. The invoice has been challenged by the defendant as a forgery. The defendant actually tendered in evidence exhibits D4A(i), (ii) and (iii) allegedly bearing the same invoice number. The defendant's evidence was that the exhibits D4A(i), (ii) and (iii) were brought to him by Mr Vinkhumbo of the plaintiff for his signature but he declined. On the other hand the plaintiff contends that since "P7A" has the purported signature of Mr Thom Mwalilino, it evidences that the defendant collected the goods. Mr Mwalilino declined that the signature was his. He produced expert evidence to show that the signature was a simulated forgery.

Furthermore with exhibits D4A(i), (ii) and (iii), instead of having three copies of one invoice it has four copies. PW1's explanation for this was that he suspected collusion between the defendant and presumably an employee of the plaintiff.

I have difficulties with the demeanour of DW2. he appeared to me to be such a person who was to deny vehemently that the signature on Invoice Number LLN 002432 was not his. He failed to explain clearly what the handwriting expert did at the time the witness submitted his specimen signatures. One gets the impression that the witness was just dragged into doing something he was not even sure of in terms of consequences. He did not even tender such specimen signature. The finding of this court is that the signature appearing on invoice LLN002432 is that of DW2 and it is not a forgery as the defendant would wish this court to believe. Therefore the Court holds the view that the plaintiff delivered goods to the defendant for which the defendant has not fully paid for despite taking delivery.

I now turn to the counter-claim. The burden and standard of proof is the same as above stated. It is incumbent upon the defendant to prove that the plaintiff had and received money from the defendant. It must be shown that the money was paid under mistake of fact or for no consideration.

Payment under mistake of fact

In the present case the defendant counterclaims against the plaintiff the sum of K11,320,984.80 paid under a mistake of fact. His contention is that the money was deposited into the plaintiff's account through the Karonga Branch of National Bank of

Malawi under a mistaken belief that his credit account with the plaintiff was in debt thus requiring him to deposit more into the plaintiff's account. He further contends that the circumstances which would make his claim fail as elucidated in the Barclays Bank Ltd vs Simms case do not exist in the present case. The defendant further contends that the plaintiff had a duty to advise him appropriately of the status of his account which the plaintiff failed to do so. The plaintiff advised him that he was still indebted to them such that even though at the time Mr Dziko of the plaintiff company so advised him through exhibit "D3" that he still owed them more than K700,000.00 he had already fully paid his debt, he effected further payments of K1,123,600.00.

Evidence was adduced before the court that the defendant used to buy goods from the plaintiff on a credit arrangement. Under this arrangement the defendant could get goods from the plaintiff and pay later by case deposits made into the plaintiff's account number 014115153400 through Karonga Branch of the National Bank of Malawi. It was clear from the evidence that the defendant used to notify the plaintiff of such deposits by faxing copies of deposit slips to plaintiff's office in Blantyre and plaintiff's office in Lilongwe. It was from such deposit slips that the plaintiff was able to post figures and produce statement tendered as exhibited "P2".

From the statement "P2" the defendant was able to see that some payments were not captured. These he isolated and captured them in exhibit "D5A". These amounted to K13,383,000.00.

The plaintiff through "PW1" tried to explain that the amounts cumulating to the K11,320,984.80 had in true sense been factored into exhibit "P2". Thus that the

defendant's claim is not genuine.

It ought to be noted that in the pleadings before the court there is no defence to the counterclaim of K11,320,984.80. Thus even though the parties spent time labouring the court on the counterclaim. This was not an issue at all. There is no joinder of issue on the counterclaim. Order 18 rule 13 of Rules of the Supreme Court clearly states as follows:

(1) "Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.

(2) Every allegation of fact made in statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, allegations, or a general statement of non-admission of them, is not a sufficient traverse of them."

Order 18 rule 14 of Rules of Supreme Court states as follows:

1. "if there is no reply to a defence, there is an implied joinder of issue on that defence

2. Subject to paragraph 3

(a) there is at the close of pleadings an implied joinder of issue on the pleading last served, and

(b) a party may in his pleading expressly join issues on the next preceding pleading

3. There can be no joinder or issue, implied or express, on a statement of claim or counterclaim."

It is very clear from O.18/14/1 (1997 White Book) that:

"Thus, if no defence is served in answer to the statement of claim or no defence to counterclaim is served in answer to the counterclaim, there are no issues between the parties; the allegations of fact made in the statement of claim or counterclaim are deemed to be admitted, r 13(1) and the plaintiff or defendant, as the case may be, may enter, or apply for judgment in default of pleading made under Order 19. A joinder of issue operates as a series of denials or all the relevant facts alleged in the preceding pleading, except in respect of any allegation which is expressly admitted.

After a joinder in issue takes effect, therefore, the pleadings will show which facts are admitted, expressly or impliedly, and which are in issue between the parties." (see also the Supreme Court ruling in *Malawi Railways Limited*

The defendant submitted that the only issue that the court was to deal with during trial involved the plaintiff's claim and not the defendant's counterclaim. All the facts in the counterclaim have not been traversed by the plaintiff. Thus by law the plaintiff is deemed to have admitted them. The admission is thus for the counterclaim of K11,320,984. The defendant further submitted that in the circumstances the court is bound to enter a judgment in favour of the defendant. The court need not bother itself with the explanation on the counterclaim made during trial. The explanations are of no legal effect.

Apparently I would agree with counsel for the defendant that there is no defence to the counterclaim. However, I wonder why the defendant did not enter a default judgment on the counterclaim before trial commenced. Counsel for the defendant did not apply for judgment and he only raised it in his submissions. I would easily accept counsel's prayer for judgment but doing so would be entering judgment for a sum that is too much. It is obvious that according to Exhibit D5A the amounts not captured in exhibit P2 amounted to K13,383,000.00. If a set off is made to the plaintiff's claim of K4,413,056.60 the counter-claim would stand at K8,969,943.40 and not K11,320,384.80.

"Even if the court were to consider evidence before it on the issue of the counterclaim, judgment in favour of the defendant would still have to be entered. It will be remembered in explaining how the amounts were isolated by the defendant as having

been unpaid "PW1" said the amounts had actually been captured in exhibit "P2". The amounts he referred to showed that they had been deposited on dates different from those on the deposit slips. In most cases the amount in "P2" were shown to have been captured on dated earlier than those on the deposit slips against similar figures. "PW1" in evidence attributed this to the fact that in their system, when one wants to access the system it requires imputing a date, then all transactions bear that date. Further that their accounts are prepared some days after closure of accounting period. He went on to state that the amount would be captured earlier to assist the customer when he is enquiring the balance on the account. On some amounts which could not tally between those on exhibit "P2" and the amounts claimed by the defendant not to have been included, he added two amounts on "P2" to come up with same figure.

The defendant contends that the explanation of "PW1" is false. In the first place it ought to be noted that "PW1" is not an ordinary man in the world of accounts, he is a Financial Controller at the plaintiff's company. By the time the matters herein arose he had worked for the plaintiff for over 5 years having joined the company in 1994 as a Chief Accountant. From his own evidence "PW1" said:

"I did not mean that a posting would be done before depositing. We would get it from the deposit slips. It is not possible to post an entry before deposit is made."

It is the defendant's contention that when he said what is quoted above he said the exact truth about the account of the defendant. The defendant submitted that his later explanations were merely afterthoughts aimed at subverting the course of justice. In

the view of the defendant it does not make any practical or even accounting sense to post a transaction as if it happened before the actual happening itself.

The defendant contends that the fact that some amounts matched was not by mere coincidence. Evidence before the court clearly shows that the defendant made divers deposits into the plaintiff's account. That some amounts were similar should not raise any assumption that the transactions to which they relate are similar but only differ in dates. Furthermore, no explanation whatsoever was given as to why some payments were split in two parts in exhibit "P2" so that to match with the actual payment in the deposit slip the splitted figures had to be added up. The defendant submitted that this was an ingenious way of running away from the obligation to refund the defendant.

There is clear authority that money paid by reason of ignorance or mistake of fact, or though excusable forgetfulness or a fact, may be recovered back as money received to the use of the plaintiff *Kelly vs Solari* (1841) 9M & W54. In *Townsend vs Crowdy* 8 C.B. (N.S.) 477 it was held that a partnership, for a price dependent upon the amount of the profits, and a mistake in the calculation of them, was entitled to get the overpayment. Even where there is a mutual misstate of fact, the plaintiff is prima facie entitled to recover the money paid under mistake *Anglo - Scottish Beet Sugar Corporation vs Spalding* U.D.C. [1937] 2 K.B. 607.

Barclays Bank Limited vs W.J. Simms Son & Cooke [1980] 1 Q.B. 677 lays down the following as principles in a claim involving payment of money under a mistake of fact:

(i) if a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.

(ii) His claim may however fail if

(a). the payee intends that the payer shall have the money at all events, whether the fact be true or false, or is deemed in law as to intend, or

(b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee by the payer or by a third party by whom he is authorised to discharge the debt; or

(c) the payee has changed his position in good faith, or is deemed in law to have done so

The defence that the payee changed his position in good faith and in reliance on the payment was considered by Mackenna J in *United Overseas Bank v Jiwani* [1977] 1 All E.R. 733. he held that the bank in that case could recover unless the defendant satisfied three conditions. In effect the defendant had to show:

(a) "that the bank was under a duty to give him account and that in breach of this duty they gave him inaccurate information; and

(b) that the inaccurate information of fact misled him about the state of the account, and

(c) that because of this mistaken belief, he changed his position in a way which would make it inequitable to require him now to repay the money.”

It is the view of this Court that estoppel cannot come to the aid of the plaintiff. The defendant is entitled to make a claim for sums advanced to the plaintiff under a mistake of fact.

Payment for no reciprocal consideration

There is plenty of authority for the proposition that money paid for consideration that wholly failed may be recovered as money had and received to his use. (Young vs Cole (1887) 3 Bing. N.C. 724). The failure of consideration must be complete in order to entitle the claimant to recover the money paid for it. (Anglo – Egyptian Navigation Co. Vs Rennie (1875) L.R. 10 C.P. 271)

In the present case the defendant overpaid the plaintiff the sum of (K8,969,943.40) The consideration for this payment ought to have been the goods delivered to the defendant by the plaintiff. As is clearly evident the defendant did not collect the goods

for which these sums were paid. There was therefore complete failure of consideration or no consideration at all. The defendant is thus entitled to recover the money overpaid as money had and received by the plaintiff.

The final position of the Court on the counter-claim is that whether under plaintiff's procedural goof or on merit based on mistake of fact or lack of consideration, the defendant would be entitled to K8,969,943.40 after set off of the plaintiff's claim.

Both parties are in agreement that this was a commercial transaction i.e. that the defendant was buying goods from the plaintiff and paying for the same. The defendant argues that the interest is payable from 16th September, 2002, when the action commenced. The Court has different views. Firstly, it is clear from the evidence of both parties that they did not charge interest on advance payment or overdue debts. The Courts should not be overzealous to order payment of interest where the parties themselves did not contemplate it. Secondly, even if this Court was to order any interest, the same could not have run from 16th September 2002 but probably 28th February, 2004 or 24th March 2004 when the Amended counter-claim was introduced. I decline to award any interest. Further it is the strong view of the Court that the counter-claim has succeeded to the extent it has because of poor recording and accounting system of the plaintiff. My belief is that the defendant might have overpaid the plaintiff but probably not to the extent as awarded by the Court. I would find it unconscionable to add more money on a figure I consider to be in excess of the appropriate figure. No interest is awarded.

COSTS

Costs are in the discretion of the court and normally costs follow the event. The plaintiff was able to substantiate its claim. So too did the defendant. However due to set off, the defendant can be said to be the overall winner. If the parties had taken the guidance given by the court, this matter could have been settled amicably out of court. The expenses and costs, for the litigation could have been avoided. I would condemn the plaintiff to pay costs for the counter-claim only. The same should be taxed, if no agreement is reached.

PRONOUNCED in Open Court at Blantyre this 19th day of August, 2005.