Mehmet Salih Bayrakday v Mohammed Abdul Mennan

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice Trouble Kalua
Cause Number:	Commercial Cause Number 162 of 2025
Date of Judgment:	November 05, 2025
Bar:	T. Banda, counsel for the Claimant G. M. Katundu, counsel for the defendant

Head Notes

Civil Procedure – Summary Judgment – Triable Issue – Defence must raise no triable issue and Claimant must prove the claim and that conditions for judgment exist.

Contract Law – Vitiating Factors – Non est factum/Fraud/Misrepresentation – Must be specifically and carefully pleaded with full particulars.

Summary

The **Claimant** applied for summary judgment in the High Court of Malawi, Commercial Division, against the **Defendant** for the payment of **$110,000.00**. The **Claimant** instituted proceedings seeking the sum advanced, compound interest, damages for

breach of agreement, contractual debt collection costs, and costs of the action. The **Claimant** based their application on an **Acknowledgement of Debt** executed by both parties on 29th November 2024, in which the **Defendant** admitted being truly and lawfully indebted to the **Claimant** for the stated sum arising from a loan, which was to be repaid within six months. The debt remained unpaid. The Defendant filed a Defence denying that any money was advanced and pleaded *non est factum*, alleging that the Acknowledgment of Debt was signed under a mistaken belief as to its nature, possibly due to fraudulent misrepresentation or undue influence by the Claimant.

The principal legal question before the Court was whether the Defendant's pleaded defence of *non est factum*, mistake, and fraudulent misrepresentation raised a triable issue sufficient to defeat the application for summary judgment as required by **Order 12 rule 23(1)** of the ***Courts (High Court) (Civil Procedure) Rules 2017***.

The Court held that it is established legal requirement that matters such as duress, fraud, misrepresentation, or *non est factum* must be **specifically and carefully pleaded with full particulars** as to where, when, by whom, and in what way the duress, mistake, or fraud was exercised. Examining the Defendant's statement of case, the Court found a complete absence of such particulars. Furthermore, the Court held that the language of the Acknowledgement of Debt was "clear and unambiguous," its purpose "bare for all to see," and that the Defendant "unequivocally acknowledge[d] his indebtedness". Given the clear nature of the document and the lack of requisite particulars for the defence, the Court was inclined to hold that the defence raised no triable issues and had no prospect of success at trial. The application was allowed, and **summary judgment was entered for the Claimant**. The Court awarded the Claimant the sum of **US$110,000.00**. The Court also ordered the Defendant to pay interest at **5% above the National Bank of Malawi**

commercial lending rate from 29th May 2025 (six months after the agreement) until full settlement, and ordered the Defendant to pay **contractual debt collection costs** in terms of the *Legal Practitioners (Scale and Minimum Charges) Rules*. The Claimant was also awarded costs of the action.

Legislation Construed

Subsidiary Legislation

Courts (High Court) (Civil Procedure) Rules 2017 (Order 12 rule 23)

High Court (Commercial Division) Rules 2007 (Order 7 rule 1)

Rules of the Supreme Court, 1965 (Order 14)

Legal Practitioners (Scale and Minimum Charges) Rules

Judgment

1. The Claimant instituted the present proceedings against the Defendant for the payment of the sum of $110,000.00 being monies advanced to the Defendant by the Claimant, compound interest thereon at 5% above the current National Bank of Malawi commercial lending rate from the date the sums were advanced to the date of payment, damages for breach of agreement, indemnification for contractual debt collection costs and costs of this action. The Defendant denies that the Claimant is entitled to any of the reliefs sought, pleading, among other things, that no money was ever advanced to him by the Claimant and that if there was a signed loan agreement between the parties herein at all then the same was signed under a mistaken belief regarding the nature of the document.

2. The Claimant then took out the present application for summary judgment under **Order 12 rule 23** of the **Courts (High Court) (Civil Procedure) Rules 2017 [CPR 2017].** The application was supported by the sworn statement of Taona Banda and a supplementary sworn statement of Mehmet Salih Bayrakdar. In opposition thereto the Defendant filed a sworn statement deponed to by Gift Matthew Katundu, of counsel for the Defendant. Both parties also filed written skeleton arguments in support of their respective positions.

3. The facts, as gleaned from the sworn statements, are simple and straight forward. On 29th November 2024 the parties apparently executed an Acknowledgement of Debt wherein the Defendant admitted being truly and lawfully indebted to the Claimant in the sum of $110,000.00 arising from a loan the repayment of which was to be made within six months from the date of execution (exhibit **TB 1**). The debt remains unpaid hence the present proceedings. The Defendant contends, on the other hand, that no money was advanced to him by the Claimant at all. The alleged Acknowledgment of Debt was signed under a mistake as to its nature and the Defendant basically pleads *non est factum*.

4. The law on summary judgment is in **Order 12 rule 23 (1)** of the **CPR 2017**. The rule provides thus:

> *"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."*

The above rule is the successor to **Order 7 rule 1** of the now repealed **High Court (Commercial Division) Rules 2007**. That old Order was couched in the following terms:

"Where in an action to which this rule applies a writ has been served on a defendant and the defendant has filed and served his defence and list of documents, a plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for final judgment against the defendant."

In our practice and procedure, the predecessor of the above cited **Order 7 rule 1** was **Order 14** of the **Rules of the Supreme Court, 1965**, in England. **In Commercial Cause Number 200 of 2024: Bosco Ezekiel Matare v Estate of Steve Jameson Phiri** and**Commercial Cause Number 213 of 2024: Haliet Zyda Wezi Ngalamira v Centenary Bank Limited**, we made reference to the comments made by Katsala J (as he then was) on **Order 7 rule 1** in **Commercial Cause Number 209 of 2009: National Bank of Malawi v Aziz M Issa t/a Famous International Haulage** when he said the following:

"This rule was taken from O.14, r.1 of Rules of the Supreme Court. However, it is significantly different. Under O.7, r.1 of the High Court (Commercial Division) Rules, 2007, the application is made when a defendant serves a defence to the action. This, in effect, introduces a different dimension on how the court will approach the application. Since the parties will have served their pleadings it means that the court will have to examine the defence in light of the statement of claim in order to determine whether the defendant has a defence to the claim or not. Unlike under O.14, r.1 of the Rules of the Supreme Court where the court has to look at the defendant's affidavit to see if it raises a defence on the merits or not. Naturally, the court will place much emphasis on the defence as opposed to the defendant's affidavit

in opposition to the application for final judgment. Consequently, while the corpus of cases decided under O.14, r.1 of the Rules of the Supreme Court remains relevant and authoritative in our understanding of O.7, r.1 of the High Court (Commercial Division) Rules, 2007, it must be read bearing in mind the differences in the two rules. The cases must not therefore be applied wholesomely."

The Court, in **Commercial Cause Number 134 of 2013: CFAO Malawi Limited v NBS Bank Limited and Naming'omba Tea Estates Limited** added that it is the duty of the plaintiff to prove his claim and show that all the conditions for summary judgment exist. It is also the corollary duty of the defendant to satisfy the court that there is an issue which ought to go for trial:**Commercial Cause Number 77 of 2007: Adam v Stanbic Bank Ltd**. We did also mention that the rule, as currently worded, is about the Claimant's "belief". Whilst a defence will have been served the Claimant can still apply for summary judgment if he believes that the Defendant has no real prospect of defending the claim.

5. The law has always been that matters such as duress, fraud, misrepresentation or even *non est factum* must not only be specifically pleaded but must be so pleaded with sufficient particularity. It is not enough to allege misrepresentation, for instance, without providing the specific particulars that lead to such plea of misrepresentation. In the words of **Nicholas Browne Wilkinson V.C in Tudor Grange Holdings Ltd v Citibank NA [1991] 3 WLR 750**, talking about duress: *duress must be specifically and carefully pleaded with full particulars of the facts and circumstances relied upon as to where, when, by whom and over whom and in what way such duress was exercised.* In talking about fraud, **Lord Denning** was clear in his warning to counsel that it is the duty of counsel not to enter a plea of fraud on the record *"unless he has clear and sufficient evidence to support it"* see **Associated Leisure Ltd v Associated Newspapers Ltd [1970] 2 QB 450 at 456.** Any charge of fraud or

misrepresentation must be pleaded with the utmost particularity. It must always be pleaded with proper particularity. The requirement to give particulars reflects the overriding principle that litigation between the parties should be conducted fairly, openly and without surprises.

6. We have had occasion to carefully examine the Acknowledgement of Debt which forms the basis of these proceedings. It is dated 29th November 2024 and is signed by both parties. It is also signed by a witness for both parties. It is then verified and witnessed before a commissioner for oaths. It is a two paged document. The opening part of the document provides as follows:

ACKNOWLEDGMENT OF DEBT

MR MOHAMMED ABDUL MENNAN

(Hereinafter referred to as "the ***DEBTOR***")

Does hereby acknowledge being truly and lawfully indebted to ***MEHMET SALIH BAYRAKDAR*** *(hereinafter referred to as the "the* ***CREDITOR****") in the sum of* ***110,000 US DOLLARS*** *arising from an agreement to lend and borrow the said sum for the Debtor to purchase a house in the Republic*

A. PAYMENT

1. *The Debtor does hereby irrevocably agree and undertake to pay to the Creditor the full amount owing by him to the Creditor in the sum of* ***110,000 US DOLLARS*** *on or before the expiry of 6 months from the date of this agreement.*

2. *The Debtor agrees to make all payments hereunder punctually direct to* ***MEHMET SALIH BAYRAKDAR*** *or such other place as the Creditor may indicate in writing to the Debtor from time to time; and no other payments shall be binding on the Creditor*

7. The language employed in the document is clear and unambiguous. The purpose of the document is bare for all to see. Nothing is hidden in fine print. Nothing lays hidden in the boilerplate. The devil is definitely not in the details. One need not read between the lines to understand what the document is about. The Defendant unequivocally acknowledges his indebtedness to the Claimant and appends his signature to a repayment timeframe. Within 6 months of execution of the document. We have not come across any simpler document to interpret.

8. The Defendant pleads that he signed the document by mistake. That he was unduly influenced into signing the document after it was fraudulently misrepresented by the Claimant. And yet there are particulars of the mistake, the fraud or the misrepresentation in the statement of case. Where? When? By whom and over whom? In what way? These are the particulars necessary for any such plea to hold. In the absence of these particulars we are inclined to hold that the defence raises no triable issues. We do see any prospects of success at trial.

9. The document was properly signed by the parties. That in itself is enough. But was also witnessed by a third person as a witness to both parties. The document was verified and witnessed before a commissioner for oaths. We do not see on what basis the Defendant would be disputing the document. The acknowledgment is clear and

unequivocal such that it would not be necessary for this matter to proceed to trial.

10. It is our finding therefore, on a balance of probabilities, that the Claimant's claim for summary judgment based on the Acknowledgment of Debt executed between the parties herein is made out. The Defendant does not have a defence to the Claimant's claim. The defence filed has no prospect of success.

11. The Claimant is therefore entitled to summary judgment for the said sum of $110,000.00. The Defendant has held on to the Claimant's money from the date the sum was due until now without any lawful justification. It is only fair that the Claimant be compensated with interest. We therefore proceed to award the Claimant interest at 5% above the National Bank lending rate from 29th May 2025 (being the cut off period of 6 months within which the debt was to be repaid) until the date of full settlement. We further order the Defendant to pay collection costs in terms of the **Legal Practitioners (Scale and Minimum Charges) Rules**.

12. The Claimant is also awarded costs of this action. We so order.

Pronounced in chambers at Lilongwe this **5th** day of **November 2025**