

Mussa v. Electricity Supply Corporation of Malawi (ESCOM) Civil Cause Number 360 of 2011

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice R.S. Sikwese
Cause Number:	Civil Cause Number 360 of 2011
Date of Judgment:	November 30, 2015
Bar:	Mwala/Chayekha, for the Plaintiff Chibwe/Mtambo, Counsel for the Defendants

Head Notes

Contract Law -Breach – Time for Performance – Reasonable Time – Where a contract does not stipulate time, performance must be within a reasonable time

Contract Law -Breach – Foreseeability of Loss – Damages – A party is not liable for unforeseeable loss or for a claim based on a plaintiff's expectation.

Contract Law -Breach – Damages – Proof – The plaintiff must prove on a balance of probabilities that the defendant's breach caused the delay and loss.

Summary

The Plaintiff, a banker and businessman, brought an action against the Defendant, a statutory body that supplies electricity, for damages for breach of contract, lost revenue, and a refund of interest paid on a loan. The dispute arose after the Defendant failed to connect the Plaintiff's maize mill business to electricity in a timely manner, despite the Plaintiff having paid the required fees. The Plaintiff had taken out a loan to finance the business and alleged that the Defendant's delay in providing electricity prevented him from generating revenue and servicing the loan, resulting in a loss of income and the accumulation of interest payments. The Defendant did not dispute the existence of the contract but argued that time was not of the essence and that the alleged losses were not reasonably foreseeable.

The principal legal questions for the Court were whether the Defendant had breached the contract and, if so, whether the Defendant was liable for the claims of lost revenue and loan interest. The Court found that the contract, specifically a document advising the Plaintiff of the connection requirements, had explicitly warned of potential delays due to material shortages. As such, time was not of the essence, and the Plaintiff's expectation of immediate connection had no legal basis. The Court held that the Plaintiff failed to prove that the delay was unreasonable or caused by an act or omission on the Defendant's part. It noted that the Plaintiff had been "reckless" to incur debt without a "water tight" contract specifying a firm timeline for the service. The Court, therefore, found that the claim for breach of contract must fail. Given that the main claim was dismissed, all ancillary claims for lost revenue and loan interest were also dismissed. The Court dismissed the action in its entirety.

Legislation Construed

N/A

Judgment

Background

The plaintiff is a banker and a businessman while the defendant is a statutory body which supplies electricity to various persons upon payment of requisite fees. In or about October 2010 the plaintiff applied to the defendant to be connected with electricity at his building in which he intended to operate a maize mill business. On or about 25 October 2010 the defendant responded to the application and advised the plaintiff the amounts he had to pay for the building to be supplied with electricity. The defendant verbally advised the plaintiff that if he paid 60% of the amount required, his building would be connected with electricity.

The plaintiff pleads that he had borrowed money from the bank as capital for his business and knew that if he did not start off the business as quickly as possible he would be made to pay interest on the loan. The plaintiff obtained yet another loan with which he paid the defendant more than 60% on 30 November 2010. The plaintiff pleads further that by 21 December 2010 he had paid the defendant the full amount required for the defendant to connect his building. The plaintiff further pleads that despite the fact that the defendant had promised to connect the building with electricity upon payment of 60% of the required amount, the defendant failed to connect the building with electricity. Further the plaintiff pleads that even after paying the full amount by 21 December 2010 the defendant failed to connect the said building with electricity up until September 2011. The plaintiff pleads that the defendant's delay to connect his building with electricity despite making requisite payments is breach of contract and claims damages for breach of contract.

The plaintiff also pleads that since the defendant failed to connect his building with electricity from December 2010 to September 2011 the plaintiff could not do his maize mill business hence he lost revenue over the period. Furthermore, the plaintiff obtained a loan from the bank to finance the project in the belief that once electricity was connected he would generate enough money with which to pay off the loan or at least to avoid paying any or substantial interest on the loan. The plaintiff also claims that due to the defendant's breach of contract he has not been able to generate the money with which to service the loan and avoid paying interest with the result that the plaintiff has had to pay monthly interest on the loan hence the plaintiff is entitled to a repayment of the interest. In summary the plaintiff claims: (1) damages for breach of contract, (2) lost revenue over the period, (3) refund of interest paid on the loan and (4) costs of this action.

The defendant did not dispute the existence of the contract. However they averred that time was not of the essence and that therefore the claim for breach of contract, lost revenue and bank interest charges should be dismissed. The defendant further submitted that the loss of revenue and interest on a loan if any was not reasonably foreseeable by the defendant and/or has not been substantiated by the plaintiff.

Issues, Analysis and the Law

1. Whether or not the defendant breached the contract?

2. If the answer is in the affirmative whether or not the defendant is liable to pay for

lost revenue and to refund interest paid on the loan?

The law

In *Mdumuka v Lindani* [1984-86] MLR390, the court held that; “where time is of the essence of the contract, a breach of the condition as to time for performance will entitle the innocent party to consider the breach as a repudiation of the contract.... However in a case where no time has been specified...the contractor must complete the work within reasonable time.” at 394.

It is clear from the evidence especially MCC1 that time was not of the essence in this contract. This document, which was advising the plaintiff of the requirements in order to have electricity connection indicated in the last paragraph that ... “Please note further that there may be delays in the provision of the service as the Corporation (defendant) is experiencing delays in delivery of materials.” An ordinary construction of this paragraph is that the defendant did not promise to deliver on its part of the contract within any specified time. It was noted further that the plaintiff did not insist on having a clear and specified time within which the defendant should perform. The plaintiff was however correct that where a contract does not stipulate time, it is each party’s expectation that performance will be carried within reasonable time.

In considering reasonable time, the plaintiff is under duty to show the court what he considered reasonable time under the circumstances. In the instant case the defendant averred that it was experiencing delays in acquiring materials for installation of electricity. The plaintiff was updated of the developments from time to

time. The only issue that bothered the plaintiff was he wanted to be connected immediately. This condition was however not in the contract. It is therefore found that time was not of the essence. The defendant was however obliged to perform within a reasonable time.

The burden of proof in civil matters rests on the one who asserts the affirmative. The plaintiff is therefore required to prove that the delay was caused by some act or omission or breach on the part of the defendant. In his submission the plaintiff alluded to the fact that he was installing a maize mill and that he obtained a loan for that purpose. That he expected electricity to be installed immediately after paying installation fees. He does not show any connection between the cause of the delay and the failure to connect his business with electricity i.e. whether the delay was caused by any act or omission on the part of the defendant entitling the plaintiff to repudiate the contract? The plaintiff's expectation has no legal backing. It is settled law that; 'the law of contract is concerned with legal obligations only and not with expectations, however reasonable they might be, see Chawani v Attorney General [2008] MLLR 1 at 13.

To the contrary, the plaintiff ought to have expected a delay in installation because that delay was anticipated as per the contract, exhibit MCC1 or RPM2. The plaintiff without bothering to seek clarification on MCC1 proceeded to pay the full installation fees even in the light of this warning concerning delays.

Having been placed on guard that ESCOM was experiencing challenges in acquiring installation equipment and having been updated on progress about the materials, the

delay if any cannot be said to have breached the contract neither can it be said to have been unreasonable. The plaintiff was rather reckless to get himself into debt in anticipation of a service for which he had no control and for which he had not made adequate insurance against loss by way of demanding a water tight contract as to time.

Finding

It is therefore the Court's finding that the claim for breach of contract must fail. The plaintiff has failed to show on a balance of probabilities that time was of the essence in his contract with the defendant for supply of electricity at his maize mill. All other ancillary claims fail alongside the main claim. The action is dismissed in its entirety.

This judgment was delivered in open court on 30 November 2015 but it is perfected today the 2nd day of February 2016 due to pressure of work. For purposes of appeal the effective date of this judgment is therefore 2nd February 2016.

Pronounced in Open Court this 30th day of November 2015 at **High Court, Commercial Division.**