IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause No. 1943 of 2005

BETWEEN

M.S. CHALANDA.....PLAINTIFF

AND

LIQUIDATOR, FINANCE BANK OF MALAWI LTD.....DEFENDANT

Coram: **Manda, J**

Msuku for the Plaintiff

Mpaka for the Defendant

Mrs Nthunzi Court Clerk/Interpreter

RULING

This is the plaintiff's motion in which the plaintiff sought the following reliefs:

1. A declaration that the defendant in under a duty to account to the plaintiff on the exercise of his duties and powers as a liquidator of Finance Bank Limited
2. A declaration that the defendant was in breach of his duties and has abused his powers by failing to account to the plaintiff as a creditor of Finance Bank
3. A declaration that by not paying the plaintiff as a creditor or making arrangements as to the payment, the defendant was in breach of his duties and has abused his powers under

the Companies Act and that he is in violation of the same and the applicant's constitutional right to an effective remedy

4. An order that the defendant should make an account on the discharge of his duties as liquidator
5. An order that the defendant should pay the applicant or that he should make arrangements for the same
6. An order removing the defendant as a liquidator of Finance Bank, and finally
7. An order that Finance Bank should be wound up by the Court under Section 212 of the Companies Act

The background to this matter is that the plaintiff commenced a claim against Finance Bank Malawi Limited on the 8th of July 2005. The action was for damages for false imprisonment, malicious prosecution and defamation as well as costs of the action. On or about the 26th day of January, 2006, Finance Bank went into voluntary liquidation. Following this development, the plaintiff proceeded to file summons for leave to sue the liquidator of Finance Bank. This application was issued on the 15th of May 2006 and was made under the provisions of Section 222 of the Companies Act (Cap 46:03) of the Laws of Malawi and under Order 15 r. 6 of the Rules of the Supreme Court.

From the record, leave to proceed against the Liquidator was granted by the Assistant Registrar, His Honour Justus Kishindo (as he then was). It is however not indicated when this order was granted and no reasons were offered for granting such an order. As it were the granting of this Order was made as a matter of course, which I must state that I find to be problematic. This is especially in view of what Section 222 of the Companies Act provides. The section reads as follows:

> *When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.*

A reading of this section clearly states that it applies ***when a winding up order has been made by the court*** [emphasis mine]. This order will of course follow a filing of a Petition for winding-up of the Company. Indeed it also be noted that Section 222 falls under the provisions of 'winding-up by the court' within the Companies Act. In the present instance, Finance Bank Limited went into voluntary liquidation, as such there was no 'order of winding-up' issued by the court, which would warrant the application of Section 222 of the Companies Act. Clearly then the Assistant Registrar allowed himself to be misled. In view of this I would urge that applications for leave should not just be treated as a matter of course as they tend to have quite an impact on the course of the action. This is more so in this instance when one considers the provisions of Section 247(1) of the Companies Act, which provides for the ***effect*** [emphasis supplied] of a voluntary winding-up and reads as follows:-

> *The Company shall from the commencement of winding-up cease to carry out its business, except in so far as in the opinion of the liquidator is required for the beneficial winding-up thereof,* ***but the corporate state and corporate powers of the company shall continue until it is dissolved*** [emphasis mine].

Indeed in terms of Section 21 of the Companies Act, a company shall be deemed to have the capacity of a natural person of full capacity, subject only to such limitations as are inherent in its corporate nature. It goes without saying that the corporate nature of a company is that it can sue and be sued. However in terms of the present instance, the fundamental issue is whether the Assistant Registrar was right to grant to leave to the plaintiff to proceed to sue the Liquidator at a time when clearly the law states that the Company continued to exist? The quick answer is that he was not and in my view there was an error in the application of the law because at that point in time Finance Bank Limited had not been dissolved and thus continued to exist as a legal entity.

Nevertheless, following the granting of leave to proceed against the Liquidator, the matter proceeded to trial. This was also after the statement of claim had been amended to also include a claim for damages for loss of business. At the conclusion of the trial, the defendant, the Liquidator of Finance Bank Limited, was found 'liable' for false imprisonment, malicious prosecution, and loss of business but the plaintiff's action failed on the claims of defamation and a specific claim for the sum of K311, 147.50. Further still, following this judgment, damages were assessed against the Liquidator of Finance Bank Limited on the claims which the court deemed to have succeeded and the plaintiff was awarded the sum of K151, 676, 000 as damages. However, technically we cannot say that the Liquidator was liable for torts acts which were committed by a company that he or she is winding up as there is no basis in law for such a holding. A liquidator cannot be deemed to have been a 'master' of the company at the time that the torts were committed so as to make him or her vicariously liable for such torts. A liquidator is not an 'agent' or 'servant' of the company within the meaning of vicarious liability.[1] This then begs the question as to whether the Liquidator was the right party to be sued in this action and in my view I must state that he was not. Indeed for all intents and purposes the tortfeasor in this matter remained Finance Bank of Malawi Limited and not the liquidator. Thus this suit should have read *'Martin S. Chalanda v Finance Bank of Malawi Ltd (in Liquidation)'*. In this regard then this court will have to proceed on the basis that the judgment in the present instance was made against Finance Bank Malawi Limited (in Liquidation) and not the Liquidator.

It must be borne in mind that in a voluntary winding-up, the liquidator's main duty is to apply the company's property "in satisfaction of the company's liabilities pari passu". At the same time, a Liquidator cannot authorise payments to be made from assets of a company in respect of anything which is not a legal

[1] This is despite the fact that the scope of vicarious liability has now been extensively widened as per the House of Lords decision in ***Lister v Hesley Hall Ltd*** [2001] UKHL 22

debt of the company at the time of liquidation (see In ***Re Nyasaland Civil Servants Co-operative Society (in Liquidation)***, 1923-60 ALR Mal 9). A civil suit against a company in voluntary liquidation does not per se become a legal debt against the company. The same only becomes a debt after judgement has been entered against the company. Thus in the present instance Finance Bank of Malawi Limited only became indebted to the plaintiff when the final assessment of the judgment sum was made by the then Registrar, Hon Justice Kalembera on 27th June 2008. At the time that this decision was being made over two years had elapsed from the date on which Finance Bank of Malawi Limited had passed a resolution to go into voluntary liquidation. In view of this, I do believe that this matter falls under the ambits of Section 286 of the Companies Act in that there was a need to have a contingency, which could only have been set up if there had been proof that this debt was impending had been lodged with the Directors of Finance Bank Limited. Indeed it is not clear from the facts that the plaintiff did provide such proof to the liquidator so that he could be recognised as a potential creditor under the winding up. In this regard, it must be noted that under Section 346 of the Companies Act, the practice and procedure for winding-up a company registered in Malawi is that applicable in England in respect to winding-up of a company. It is a requirement in England that there must be formal proof of debts which are not priority or preferential debts (See ***Buchler & Anor v Talbot & Anor*** [2004] 1 All ER 1289 being UKHL 9).

In this instance the plaintiff is for all intents and purposes an unsecured creditor hence it was incumbent upon him to file a 'proof of debt' with the liquidator at the time that he become aware that Finance Bank Limited had gone into liquidation. This more so if one considers that Section 248 of the Companies Act provides for a twelve-month limitation period for a company in voluntary liquidation to pay its debts and liabilities in full. The filing of a 'proof of debt' thus helps the directors of the company in voluntarily liquidation make an informed inquiry into the

affairs and liabilities of the company, before they can make a written declaration that they would settle all their debts and liabilities in full, in terms of the provisions of Section 248(1) of the Companies Act. Of course it may be argued that the plaintiff's claim being one of unliquidated damages they would have been difficulty in coming up with the proof of debt, however this argument is precluded by Section 286(1) of the Companies Act which allows for 'a just estimate' to be made of such a debt or claim.

The fact that the proof of debt was not filed when Finance Bank went into liquidation will thus make the plaintiff's claim fall outside the liquidation process. In such a situation then I d not think that the plaintiff can be allowed to prove his claim as part of the liquidation process. Indeed if the plaintiff was allowed to prove his claim of debt against the Liquidator of Finance Bank Limited, it will be tantamount to giving his debt priority which it did not have since the same was unknown to the directors of the company when they passed a resolution to voluntary wind-up Finance Bank of Malawi and hence most likely there was no contingency provided for it. Indeed had the plaintiff filed his proof of debt before or at the commencement of the liquidation, Finance Bank would have been required to make a payment into court in the sum of the estimated claim which would in turn have made the plaintiff a secured creditor (see ***W.A. Sherratt Ltd v. John Bromley (Church Stretton) Ltd.*** [1985] QB 1038). In the ***W.A Sherrat case*** Oliver L.J. commented at page 1056 as follows:-

> *"... I am not clear why it should be thought desirable that a creditor who has a valid claim but is kept out of his money by a defence which ultimately fails should be deprived of the advantage which he gains by a payment into court"*

He then went on to express his conclusion at page 1057 as follows:-

> *"In my judgment the principles emerging from the* ***In re Gordon*** *line of cases are still applicable to money paid in*

under the current rules. The plaintiffs are therefore secured creditors to the extent of that money in the defendants' liquidation..."

As the situation stands, the plaintiff is not a secured creditor and in my view he is to be deemed to have commenced proceedings against a company which was in the process of being dissolved because it was declared insolvent by its owners. Indeed while the commencement of voluntary liquidation does not automatically stay any proceedings against the company in liquidation. In England however, a liquidator can apply to the court to stay proceedings against a company in liquidation under the Insolvency Act.

What is also worth noting is that in a case where a company is in compulsory liquidation and there has been appointed a provisional liquidator, following an order of winding-up, one has to obtain leave from the court to commence or proceed with a claim against a company in liquidation. The granting of such leave is not just a matter of course as it may come with conditions, one such condition being that the claimant must make an undertaking not to make any claims against the funds available for distribution to creditors. In my view, I would think that when the Assistant Registrar was granting leave to the plaintiff in this instance to proceed with a claim against the liquidator of Finance Bank, he should have required the plaintiff to make such an undertaking. This is especially in view of the fact that the plaintiff at that time was not a known creditor of Finance Bank Limited, the plaintiff not having filed his proof of debt with the liquidator. Indeed when granting the plaintiff leave to proceed against, the liquidator, the Assistant Registrar should have made an inquiry as to whether the plaintiff had registered his proof of debt with the liquidator, which is a requirement under the law. Indeed having made such an inquiry, the Assistant Registrar should then have given directions regarding the issue of payment into court of the estimated judgement sum. Only then could the plaintiff in this instance have been deemed as a secured creditor with rights to call upon the Liquidator to

pay him balances, if any, which may have remained after the estimated judgement sum paid earlier into court, had been given to him.

From the foregoing, unless it can be shown that the plaintiff did file his proof of debt with either the directors of Finance Bank Limited or indeed the Liquidator, he remains an unsecured creditor who does not have any rights to the funds which would have been made available for distribution to secured and other known creditors of Finance Bank when it went into liquidation. Indeed if the plaintiff did not take any steps to formally prove his potential debt to the directors of Finance Bank or indeed the liquidator, prior to or after the liquidation process had commenced, then his claim falls out of the liquidation process and I do not see how the Liquidator will be obligated to the plaintiff (see ***Anglo-Manx Group Limited v Aitken*** [2002] BPIR 215 cited in ***Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd*** [2005] EWCA Civ 1408 (29 November 2005) *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2005/1408.html). If anything all that the plaintiff can do, having commenced a claim against an insolvent company is to file his judgement with the liquidator and hope that there would be funds remaining from the liquidation process after all the secured, preferential and prioritised creditors have been paid. Alternatively, when the plaintiff was commencing this action, he should have made an inquiry as to whether Finance Bank Limited had third-party insurance. This is in view of the fact that the company's rights under the policy do not form part of the assets available to the creditors in the liquidation (see the case of ***Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd***).

Having said all the above, I must then proceed to dismiss the plaintiff's motion in its entirelity. This being a matter of a company going into voluntary liquidation, there is set procedures under the law which the plaintiff ought to have undertaken to enforce his claim. The plaintiff not having done what he was

required by law to; he cannot then come to court and ask the court to continue winding up Finance Bank. This is especially in view of the fact that the decision to wind up Finance Bank was already taken by its directors and that all that remains is for the Liquidator to make funds available to the creditors which were known at the time of the commencement of liquidation, among which plaintiff is not included. Indeed if the liquidator is not doing his job as expected, it is up to the known creditors to call upon him to account and not the plaintiff.

Finally from the nature of these proceedings I will make no order as to costs since much as I of the view that the plaintiff failed in his obligations to identify himself as a creditor, I still do sympathise with his predicament.

Made in Chambers this 30th day of March 2011

K.T. MANDA

JUDGE