BANDA J.

IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.232 OF 1985

BETWEEN:

INDEFUND LIMITED ..... PLAINTIFF

AND

ERNEST LIMITED MANGULUTI ..... IST DEFENDANT

AND

ROSEMARY MANGULUTI ..... 2ND DEFENDANT

Coram: MTEGHA, J.

Msiska, Counsel for the Plaintiff
Defendants present, unrepresented
Namvenya, Official Interpreter
Phiri, Court Reporter

JUDGMENT

Indefund, hereinafter referred to as the Plaintiff, is a body corporate registered in Malawi. Its main object is to lend money to and assist in financing business undertakings especially to Malawians.

Ernest Manguluti and Rosemary Manguluti, hereinafter referred to as defendants, are husband and wife. They were shareholders and directors of a limited liability company known as Chiringa Enterprises Limited hereinafter referred to as "the Company" which they formed in 1981. Its main business was tailoring.

The plaintiff is suing the defendants in their personal capacity as guarantors of a loan advanced to Chiringa Enterprises, to recover the sum of K42,060.75 as arrears of principal and interest, plus additional interest until the amount is fully paid.

The plaintiff's pleadings allege that by an agreement in writing, between the plaintiff and the Company, the plaintiff advanced the sum of K50,000.00 by way of loan at an interest of 13% per annum to be paid by the Company in 10 half yearly instalments over a period of 5 years, and the first of such instalments was to fall due on 31st March 1984. As an express term in the agreement, the

defendants were to provide personal guarantee for the repayment of the loan, interest and other charges by the Company to the plaintiff on the agreed dates. In pursuance to this express term the defendants executed a guarantee on 25th August 1983 whereby they undertook to be liable jointly and severally to the extent of the said sum of K50,000.00 in the event that the Company defaulted in its repayments to the plaintiff, after having due notice.

As at 31st July 1985 the Company had defaulted and was in arrears of K42,067.73 in respect of both capital and interest. Despite notices and demands to settle the amount, the defendants failed to do so, hence this claim.

The defendants deny liability. Their pleadings disclose that they did not receive the notices of demand and that since the Company went into receivership on 4th April 1985 and a Receiver/Manager was appointed, they were automatically discharged. Further they allege that the plaintiff was not justified in declaring the receivership, that the Company paid K1,850.00 interest and K5,000.00 capital during the first year. They also allege that there was an agreement to pay the arrears by instalments commencing April to July 1985, yet the Company was under receivership on 4th April. They are also counterclaiming the sum of K6,296.94 being terminal benefits, and general damages for loss of business and reputation.

In brief, then, these are the parties pleadings. I will now turn to the evidence adduced before me.

The first witness for the plaintiff was D.R. Kantembe, who is the plaintiff's manager since 1983. He told the court that the plaintiff's main object is to finance medium and small scale businesses in Malawi. He went on to say that the defendants went to see them personally to seek finances. Since they required a large sum of money he advised them to form a limited liability company and this they did. After all preliminary issues were settled, the plaintiff's board approved a loan of K50,000.00. As security for loan a debenture was executed in favour of the plaintiff over the assets of the Company which was duly registered. Indeed, the debenture was produced in court as exhibit P1. Further, he went on, the defendants signed a personal guarantee, which is exhibit P2 and a loan agreement, as directors of the Company, exhibit P3. As a result of these agreements, the witness went on, the plaintiff disbursed a sum of K49,850.00 in form of cheques to pay salaries and wages to employees and supplies of materials and equipment for the Company. These cheques were produced as exhibits P4(a) to P4(x). When it was discovered that the Company was in default of its payments, the plaintiff wrote to each of the defendants, as directors, on 27th December 1984, exhibits P5 and P6. The letters were identical and they were to this effect:

"I refer to recent discussion I had with you on the above subject.

In terms of the guarantee dated 25th April 1983, issued by you and your wife to Indefund Ltd., I hereby give notice that Chiringa Enterprises has defaulted to pay interest in the sum of K5,812.00 due on the above loan. The interest has not been paid despite repeated reminders. Please note that unless you pay the said sum of K5,812.00 within 7 days from the date hereof our Lawyers will institute legal proceedings against you for recovery of the same without further reference to you."

This letter was signed by the witness. On 29th December the defendants wrote back proposing to pay the arrears by instalments. The plaintiff wrote back on 7th January 1985 agreeing to the rescheduling of the payments as follows:

"Following to our discussion we had in our office to-day the 7th January 1985 we wish to inform you that we have agreed in principle to your proposal to pay the outstanding interest of K4,812.20 subject to strict adherance to the payment schedule below:

14th January 1985	-	K1,000.00
21st January 1985	-	K500.00
28th January 1985	-	K500.00
4th February 1985	-	K500.00
11th February 1985	-	K500.00
18th February 1985	-	K500.00
25th February 1985	-	K500.00
4th March 1985	-	K500.00
11th March 1985	-	K312.20
		K4,812.20

"Please take note that if you default to pay any one instalment as laid out above we shall take legal action without further notice to you."

It was Kantembe's evidence that after this agreement the defendants did not pay anything, and the matter was handed over to Lilley Wills & Co. to recover the amount which by now had accumulated to K11,961.90. The lawyers wrote to the defendants on 6th March 1985 and that letter of demand stated:

"We have been instructed by Indefund Ltd. to demand and collect from yourselves personally pursuant to the above cited guarantee the sum of K11,961.90 being arrears of both interest and principal on the above loan agreement between Indefund Ltd. and Chiringa Enterprises Ltd. This demand is made to yourselves in your personal capacities as guarantors both jointly and severally of the repayment of the loan issued to Chiringa Enterprises Ltd. for K50,000.00.

Our clients reserve the right to proceed against the Company directly by excercising its right in the instrument of debenture, but would rather first start with yourselves as guarantors without necessarily acting against the Company itself ....."

On 7th March 1985 the defendants wrote to Lilley Wills & Co. offering to pay the amount as follows:

1st April 1985	-	K2,000.00
1st May 1985	-	K3,000.00
3rd June 1985	-	K3,480.95
1st July 1985	-	K3,480.95
		K11,961.90

On 11th March 1985 the lawyers sent a photostat copy of this offer to the plaintiff. No reply was received, and on 26th March Lilley Wills & Co. wrote a reminder, and on 29th March the plaintiff wrote and stated: "Further to your letter of 6th March 1985 and subsequent telephone conversations you had with Mr. C.S. Chilingulo and the writer this afternoon, I would like to confirm that you proceed with the appointment of the Receiver and Manager of the above Company.

In view of the attempts being made by Mr. Manguluti to dispose of some of the assets of Chiringa Enterprises Ltd., it would be greatly appreciated if you would expedite the appointment of the Receiver and Manager." This letter was signed by the witness. Acting on these instructions, Mr. Savjani was appointed Receiver and Manager on 4th April 1985, but was discharged, and on 9th April 1985, Mr. Gerald Anthony Gaunt was appointed Receiver and Manager in terms of the debenture over the assets of the Company. When the receiver and manager took over the assets of the Company, he sold the assets for K24,278.00 and after taking this amount into account, the witness went on to say, the loan and interest as at 31st July 1985 was K42,060.73, and this is the amount advised to the lawyers to recover.

I will pause here and examine the evidence of Mr. Gaunt who was called as the second witness for the plaintiff. It was in his evidence in chief he and his firm have handled several receiverships during the years. He was appointed receiver and manager of Chiringa Enterprises Ltd. in April 1985 by the debenture holders, and that according to the powers in the debenture he complied with them. The value of the assets as compiled by Mr. Manguluti was K29,895.00, that is furniture, machines, motor vehicle and sundry items such as finished goods and unfinished goods on the premises. The values, as estimated by the first defendant, were either at cost price or at selling price. The motor vehicle was acquired from somebody in Limbe, who had the impression that

he had bought it. It was his evidence that the proceeds from sale after advertisement were K24,278.00 and he paid out preferential creditors such as employees terminal benefits, amounting to K6,250.00 and the money actually handed over to the plaintiff was K18,028.00. It was in his evidence that the decision to sell the assets was that the Company could not be run on profit, and out of the offers received, they accepted the best offers, such as, in respect of the motor vehicle, Singer Sewing Machines offered K3,200.00 and Miss Mwasi offered K400.00 for goods and K20,000.00 for machines. He also told the court that the records of the company were not properly kept, as such they did not know the names of creditors and debtors and he refuted the fact that the receivership was handled negligently.

I will now turn to the evidence adduced by the first plaintiff's witness in cross-examination. It was his evidence that Chiringa Enterprises Ltd. qualified for a loan which was approved on 25th August 1982, after they were asked to contribute K10,000.00. The loan was not granted to the defendants in their personal capacity. The repayments were to commence in 1984. Indeed, the debenture clearly shows, at page two, the amortization table which shows clearly that they were to repay in 10 equal instalments of K5,000.00 each from 31st March 1984 to 30th September 1988, giving a grace period of 2 years from the date of the loan. It also came out in cross-examination that Mr. Savjani was discharged from acting as receiver and manager because of the abusive words uttered by the first defendant. He flatly denied the fact that the powers to appoint receiver and manager was prompted by the fact that the first defendant was going to Zambia on training, but because of the decision by the Board of Directors of Indefund. He also revealed that the vehicle was sold to one Omar of Limbe who went to their office to ask for the registration book. He agreed that Chiringa Enterprises Ltd. was a limited liability company and the defendants liability was limited. He also disputed that he forced the defendants to pay K880.00 to Mr. Tembo to redeem his machines because Tembo was his brother-in-law, but that since the defendants required more machines, he suggested to them to get Tembo's machines, which Mr. Tembo failed to redeem from the Sheriff. In cross-examination of the second plaintiff's witness, the witness said that the money which was realised on sale was utilized for the payment of preferential creditors, and in his opinion the amount realised was good price taking into account that the machines were old. He admitted that according to the defendants, work in progress etc. was valued at K3,200.00 but was sold at K400.00 because that was the best offer he had received after the goods were advertised. The vehicle was sold at K3,200.00 which was reasonable. He further went on to say that the debts were so small that it was more

expensive to recover them. He confirmed that he had paid all the employees except the defendants because there were no records to show that they were employees of the Company and no terms of employment were shown to him.

This then was the evidence of the plaintiffs. The defendants gave evidence.

The first defendant told the court that he was the shareholder and managing director of Chiringa Enterprises, appointed as managing director by Indefund Ltd. at a salary of K500.00 per month, doing general administration, control of finances, production and sales. On 4th April 1985 the Company was unilaterally declared to be in receivership under a debenture. He stated that he is not liable to pay the amount representing the loan and interest, because Chiringa Enterprises is a Limited Liability Company and, at the moment, the receiver and manager should pay this amount of money because he is running it. He further went on to say that the loan was disbursed from March 1983 to July 1983, and in December 1984 he paid K1,000.00 and in January he paid another K1,000.00. He then told the court that because of his success he attended Trade Fairs in Maputo and was offered training in Zambia, which he did not attend because the Company was in receivership. He had injected K10,000.00 into the Company and a further K1,500.00. Further he stated K880.00 was given to the first plaintiff's witness to assist his brother-in-law, which amount was for repayments to Indefund, and has not been recovered. He further went on to say that he does not own any property over which he could have given personal guarantee, but only the Company's assets; that the life policy was intended to cover the loan if he died. He went on to say that there was an agreement to pay the arrears of interest and principal from April to July 1985, and in breach of this agreement the plaintiff ordered a receivership of the Company. The agreement to reschedule these arrears was written on 26th March 1985, yet that agreement has not been produced. He called the Registrar to give evidence to support him. Indeed, the Registrar of the High Court was called who testified that according to his notes when the case came before him on 3rd June 1985, Mr. Ng'ombe, then acting for the plaintiff, conceded that there was such an agreement. Further, he testified to the effect that both the defendants have not been paid their terminal benefits for which he is counterclaiming. He called the Regional Labour Officer Mr. Chinere to support him. He indeed told the court that employees are entitled to wages when a company is being wound up, but in cross-examination, he stated he did not know whether the defendants were employees of the Company. He further went on to say that since the plaintiff put the Company in receivership, his reputation has been damaged and he is claiming general damages for that loss. He was not satisfied with the sale

of goods. He further went on to say that he was not liable because these documents were signed well after the loan had been given - that he did not even read them.

The evidence of Mrs. Manguluti, the second defendant, is more or less the same as that of the first defendant. What the first defendant said equally applied to her.

This then is the evidence for both the plaintiff and defendants. My task is, at this juncture, to evaluate it and draw some factual conclusions which I will have to relate to the law applicable in this dispute.

From the evidence before me, it is a fact that the defendants were directors of Chiringa Enterprises Ltd. and owners of the Company. It is also a fact that the plaintiff's main duty is to lend money to small scale businessmen in Malawi. It is also not disputed by the defendants that a loan was granted to Chiringa Enterprises amounting to K50,000.00 as evidenced by the loan agreement dated 25th August 1983 signed by the director and secretary of the plaintiff and defendants as directors of the Company. It is not necessary for me to list down all the terms of agreement; but suffice it to say that the loan was granted to the Company on certain conditions. The relevant ones for my purpose are preconditions in CLAUSE II. Clause II(1) states:

> "Notwithstanding anything herein contained the provisions of this agreement shall not come into force unless the following preconditions have been fulfilled to the satisfaction of the Lender (Plaintiff): .....
>
> (b) Personal guarantee shall have been given to the Lender by the Directors.
>
> (c) The borrower shall have duly executed and issued the Debenture.
>
> (e) The directors shall have issued to the Lender personal guarantee as Collateral Security to the Debenture including Assurance Policies covering personal accident, life and disability with the Lender's interest named as primary beneficiary."

In conformity with these preconditions, a personal guarantee by the defendants was issued on the same date. It stipulated:

"We the undersigned hereby guarantee to the Lender the repayment by the Borrower of all sums of money advanced by the Lender to the Borrower as aforesaid with interest at the rate of 13% per annum subject hereinafter mentioned.

1. Notice in writing of any default on the part of the Borrower is to be given by the Lender to us within Seven days from its receipt payment shall be made by us of all sums then due from us under this guarantee.

2. This guarantee is a continuing guarantee throughout the period of the repayment of the Loan and or liability under it is joint and several.

4. Under no circumstances shall our total joint and several liability hereunder exceed in the aggregate the said sum of K50,000.00 plus interest thereon and any other charges related thereto and we jointly and severally undertake to abide by the terms covenants and conditions of the Loan agreement and of this guarantee."

The defendants then signed the guarantee. On the same date they executed a debenture which was registered on the same day with the Registrar of the Companies. The debenture charged a floating charge over all the assets of the Company. Condition 6 of the Debenture gave power to the Lender, in this case the plaintiff, to appoint a receiver; and condition 7 gave powers to the receiver to deal with the property of the Company. It specifically stipulated that the receiver shall be an agent of the borrower and the borrower was responsible for his acts and defaults.

From these facts, therefore, it is conclusive that the defendants personally guaranteed the loan if the Company defaulted in its repayments according to amortization table in the debenture. It is clear again that there was a floating charge over the assets of the Company; and it is clear that the plaintiff was entitled to appoint a receiver and manager of the company according to the debenture. From the evidence before me the defendants allege that the receiver and manager was appointed prematurely because there was an agreement to reschedule the arrears of interest and principal on 26th March 1985, just before the Company went into liquidation.

Generally, the position is that a receiver will be appointed by a debenture holder in cases where the principal is in arrears, or when the interest is in arrears even though, in accordance with the terms of the debenture, the principal is thereby been rendered payable. Again, when any other event has happened by which, under the terms and conditions of the debenture the security has become enforceable. Again it is normal to appoint a receiver and manager where the security is in jeopardy. The headnote

to the case of MacMahon v. North Kent Ironworks Co. (1891) 2 Ch.D 148 is in point here where it states:

> "Upon the principle that a mortgate is entitled to the protection of his security, the court will, at the instance of a debenture holder of a limited company, appoint a receiver of the property so charged, if the security is in jeopardy through the insolvency of the Company, even though the principal secured by the debenture is not immediately payable and default has not yet been made in payment of interest."

A similar principle was adopted by North, J. in the case of Edwards v. Standard Rolling Stock Syndicate (1893) 1 Ch.D 574.

The first question then which I have to ask myself is: was the receiver and manager properly appointed? It has been argued by the defendants that the appointment of receiver and manager was premature because, as at 26th March 1985, there was an agreement to pay both arrears of capital and interest with effect from end of April 1985. Secondly, it has been argued that in terms of the debenture, the Company was not in default at all. On the other hand the plaintiff has argued that in terms of the loan agreement and debenture the receiver and manager was properly appointed. I agree with the argument submitted by the plaintiff; the Company never complied to the amortization table. Notices of arrears were given to the Company, and the Company negotiated terms to pay by instalments. This is a clear admission that the Company was in arrears which fact entitled the plaintiff, as debenture holder, to appoint a receiver and manager. It is also not correct that there was an agreement on the 26th of March 1985 to pay the arrears by instalments as from April to July 1985. There is no evidence to support this. The defendants have alleged that such agreement had been hidden or destroyed by the plaintiff. I do not think so. On the contrary, the defendants offer was submitted to the plaintiff by Lilley Wills & Co. on 11th March 1985; no reply came from the plaintiff accepting the defendants offer, and a reminder was sent again on 26th March 1985, but no reply came, which clearly shows that the plaintiff did not accept the offer. It cannot be said, therefore, that there was an arrangement accepted by both parties.

It has also been submitted by the defendants that the Company never tried to dispose of the assets such as the motor vehicle. There is evidence from Mr. Kantembe and Mr. Gaunt that the vehicle was repossessed at Limbe from one Omar. There is evidence to show that Omar came

to the plaintiff's office to get the registration book. This, surely, shows that the defendants were trying to dispose the assets of the Company contrary to the express terms of the debenture. From these premises, then, I hold that the manager and receiver was properly appointed and I see nothing that can invalidate that appointment.

The next question which I have to answer is whether the receivership was conducted properly. The defendants allege that Mr. Gaunt conducted the receivership negligently in that the property, total value estimated by the defendants at K29,895.33, was sold at K24,278.00. Prima facie this appears to be so; but sight should not be lost that most of the property consisted of machines, which were second hand, and the offers which the receiver and manager received after advertisement were few and that he got the highest. The duty of the receiver and manager is to take possession of the assets of the company and to deal with them as best as he could. He is therefore liable only in cases of wilful default. I do not think that in the present case there was any wilful default. In the present case, the receiver and manager was given, under the debenture, extensive powers under Condition 7(a) to (g). Again, it was stipulated in the debenture that,

> "(7) A receiver so appointed shall be the agent of the Borrower and the Borrower shall alone be responsible for his acts and defaults and for all his costs charges and expenses to the exclusion of liability on the part of the Registered Holder ....."

This condition clearly exonerates the plaintiff. It follows therefore that if at all the receiver and manager was negligent in the sale of the assets, that issue is between the receiver and manager and the defendants, and not with the plaintiffs. The submission therefore fails.

It has also been argued by the defendants that they are not personally liable because the Company was a limited liability company, and therefore the plaintiff should have proceeded against the Company. I do not agree with this submission. The plaintiff had three options to take in case of default. It could proceed on the debenture as well as against the defendants on their personal guarantee, and against both the Company and defendants. They decided to go for the defendants. I do not see how the defendants could escape from the provisions of the Guarantee, which is very clear indeed. It has been submitted that they did not know the contents of the Loan Agreement, Debenture and Personal Guarantee when they signed these documents on 25th August 1983 because by then the loan had already been disbursed. I do not think this is correct. The defendants are educated people. They know how to run a business. I cannot accept that they did not know.

It has been argued by the defendants that they were entitled to terminal benefits of K3,846.94 and K2,450.00 respectively because they were employees of the Company as Managing Director and Secretary respectively.

It is correct that employees of a company in liquidation must be paid up to the date of liquidation, but, as the learned counsel for the plaintiff submitted, there should be evidence to show that they were employees of the Company. In my considered opinion I have seen no evidence that the defendants were employed by the Company. I therefore reject this counter-claim. For these reasons I give judgment for the plaintiff in the amount claimed plus interest at 13% until the debt is paid. I also award costs for these proceedings to the plaintiff.

PRONOUNCED in open Court this 22nd day of May, 1987 at Blantyre.

H.M. Mtegha
JUDGE