

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL JUDGMENT CAUSE NO. 1 OF 1986

BETWEEN:

DEWETO INTERNATIONAL LTD.....PLAINTIFF

-and-

GATOR INTERNATIONAL (MW) LTD.....DEFENDANT

Coram: The Hon. Mr. Justice Unyolo
Banda of Counsel for the Plaintiff
Defendant absent, unrepresented
Namvenya, Court Clerk

R U L I N G

This is an application on the part of the plaintiff for orders as follows:

- (a) That the assets of the Defendant herein now under seizure be sold by private treaty;
- (b) That the sale should take place at the operational base of the said Defendant;
- (c) That one K.M. Mhone be asked to conduct the sale and make sure that as much as possible is realized from the sale;
- (d) That proceeds of the sale be distributed to the Defendant's creditors on a pro rata basis;
- (e) That the Sheriff be paid his fair and reasonable fees out of the proceeds of the said sale; and
- (f) That consideration be given to genuine and legal financial claim by some workers of the said Defendant and also to a claim by Management and Projects Limited, which claims are to be verified by a Committee of Creditors set up for the purpose.

I am informed that the application is made under the provisions of 029/7 and 015/16 of the RSC. I shall have something to say on this aspect at a later stage.

The history of the matter can be stated briefly. The plaintiff is a Limited Company incorporated in Liberia. It has branches in several other parts of the world including the U.K. It carries on business as importers, exporters, shippers & shipping agents, carriers and dealers in motor trade, to mention only some, in all its said branches.

The defendant, on the other hand, is likewise a limited company originally incorporated in the U.K. and it is also registered in Malawi as an external company. It carries on business as shippers and carriers.

In April, 1986, the plaintiff obtained judgments in the Royal Court of the Island of Guernsey in the United Kingdom for the sum of U.S.\$79190.00 and Tanzanian shillings 950615.00 which is equivalent to MK213,527.63 plus interest thereon at the rate of 16% per annum. The said judgments were on 10th June, 1986 registered in this Court, under the provisions of 071 of the RSC. Before long the plaintiff proceeded to issue a writ of *fifa* for the said sum of K213,527.63 and interest. It then turned out that the defendant was, so to say, already up to the neck in debt. The Sheriff advised that the assets of the defendant had already been seized upon several other warrants of execution issued at the instance of divers other creditors. The creditors list submitted by the said Sheriff shows a total of 53 other creditors apart from the plaintiff herein. The information here was a bitter pill for the plaintiff to swallow. As quick as thought an *ex parte* application was brought before the court for an interlocutory injunction to restrain the Sheriff from selling the said assets until all the judgment creditors had met and decided on the most fair, just and equitable way of dealing with the said assets for the benefit of all the creditors concerned. The application came before a brother Judge who at the end of the day granted an interim injunction as prayed for by the plaintiff.

Now comes the present application. It is said that the judgment creditors did meet and made resolutions which form the subject of the orders sought in this application. A copy of the minutes of the meeting concerned has been exhibited. Such are the facts.

Perhaps I should at this juncture say something touching on procedure. The application in this case has been made by notice of motion and as already indicated the plaintiff says that it has brought the same under the provisions of 029/7 and 015/16 of the RSC. Counsel very fairly conceded that the plaintiff should, however, have brought the application under the provisions of 0.47/6. With respect, I agree. That Order specifically encompasses applications for the sale of seized property, as in the present case, by private treaty. Counsel said he opined that if he brought the application under this latter provision, by summons, the same would have to come before the Registrar and not a Judge. With respect, I do not agree. Applications made by summons can be brought before a Judge. In fact generally, chamber applications before a Judge are brought by summons as opposed to motions. Indeed, to my mind, the two provisions cited by counsel are not applicable on the facts obtaining in the present case. Strictly, I do not think that what the plaintiff seeks by the application are directions for further proceedings in this matter or a declaratory judgment or order as envisaged by 0.29/7 and 0.15/16. The underlining is supplied for emphasis.

I have examined the matter closely to see if the orders sought can be sustained. I shall deal first with point (a) where the court is asked to make an order that the defendant's assets, now under seizure and in the custody of the Sheriff, be sold by private treaty.

Section 16 of the Sheriffs Act is pertinent. It provides as follows:

- "(1) Where any property is to be sold under a warrant for a sum exceeding twenty pounds, including proper incidental expenses, the sale shall, unless the court from which the warrant issued otherwise orders, be made by public action, and shall be publicly advertised by the Sheriff on the day of sale and the three next preceeding days.
- (2) Where any property is seized in execution and the court has notice of another execution or other executions, the court shall not consider an application for leave to sell privately until the prescribed notice has been given to the other execution creditor or creditors, who may appear before the court and be heard on the application."

The point to be noted here is that while a court has power under the abovementioned provision to make an order for the sale of seized property otherwise than by public auction, where the court is aware or has notice, as in the present case, of other executions, an application for leave to sell such property by private treaty should not be considered or entertained until the other execution creditors have been informed about such application and thereby given an opportunity to be heard in the matter. This means that the plaintiff was required to serve the other execution creditors as appear in the Sheriff's list, already mentioned, with the process in this application thereby giving them severally an opportunity of being heard and as already indicated, the plaintiff should have proceeded by way of summons. Actually, O.47/6 is to the same effect. It requires that such summons should be served on every person named in the Sheriff's list.

I am mindful of the fact that a meeting of the creditors was convened in the present case. Two points emerge. First, it is noted from the minutes of the said meeting that only a handful of the creditors did attend the meeting. The majority did not. Secondly, in terms of the procedure I have outlined above, the matter was not to be proceeded with simply by means of a meeting of the creditors as was done here. A summons should have been served on each of the creditors as I have already observed. Clearly, each of them has an interest in the seized property and they are all entitled to know what is to happen to such property. In short, I would, in the circumstances, be loath to grant the order sought on this aspect.

I now turn to the order sought under (b) viz. that the sale of the seized property should take place at the operational place of the defendant. My comment on this aspect is that since the items have already been removed from the defendant's said operational base and are now lying at the premises of the assistant sheriff in the Central Region, it would be a costly exercise in my view, to take them back to the defendant's premises and indeed, such an exercise would not work out in the interests of the creditors.

Next, I turn to point (c) namely that one K.M. Mhone should conduct the proposed private sale. It is noted from the minutes of the creditors' meeting that this gentleman attended that meeting as a representative of one of the creditors. He, therefore, has a direct interest in the matter and for my part, I would refuse to authorise that such a person conduct the sale in these circumstances.

Point (d) raises interesting points. As indicated earlier, what is sought on this aspect is an order that the proceeds of the sale of the seized property should at the end of the day be distributed to the judgment creditors on a pro rata basis. Section 18 of the Sheriffs Act is pertinent. It provides as follows:

"When warrants against the property of any person have been issued from more than one court, the right to the proceeds of the property seized shall, subject to section 43 of the Bankruptcy Act, be determined according to the order of priority of the respective times of application to the courts for the issue of the warrants."

I appreciate the point which has prompted the present application. Simply the plaintiff stands to get nothing from the proceeds of the sale in this matter as its name appears at the bottom of the Sheriff's list. Since, however, the defendant's property has already been seized in execution and is in the custody of the Sheriff, I consider that the provisions of the Sheriffs Act must be complied with. In my view, section 18 is unambiguous and while I sympathise with the plaintiff the right to the proceeds of the said property must be determined according to the priority of the warrants as stipulated by the section herein. Indeed, both at law and in equity the basic rule is 'Qui prior est tempore potior est jure' - he who is earlier in time is stronger in law.

This leaves out points (e) and (f). Simply I do not find it necessary to discuss these two issues. I think that what I have said above determines the matter.

In conclusion, I would like to place on record my appreciation to counsel for the manner in which he presented the matter to this Court and for the eloquent argument he put up.

All in all and for the reasons I have given, this application must fail and it is dismissed.

Delivered in Chambers this 8th Day of January, 1988 at Blantyre.


L.E. Unyolo
JUDGE