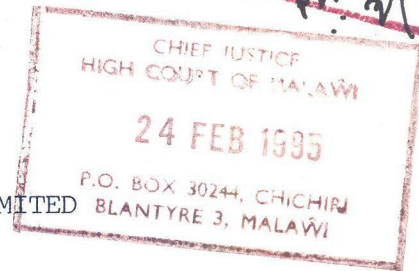


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 109 OF 1988



IN THE MATTER OF MAPANGA ESTATE LIMITED

- and -

IN THE MATTER OF THE COMPANIES ACT, 1984

CORAM: Tembo, Acting J
Msaka, Counsel for the Petitioner
Msiska, Counsel for the Respondent
Nkhoma, Official Interpreter

R U L I N G

This is a motion taken out by Miss Rosemary Argente (Petitioner) who is asking the court to order that:-

- "(a) the judgment of Mr Justice Mtegha dated 15th April, 1988, be complied with by Mr James Allan Sauze (Respondent) within such period as the Court will deem fair, just reasonable and expedient, after which time the Petitioner should be at liberty to sell her shares to any other party;
- (b) a proper and comprehensive audit of the companies affairs for the years ending 31st March 1987, 1988, 1989, 1990, 1991, 1992, 1993 and 1994 be carried out for purposes of ensuring that the company's affairs have been properly conducted having regard to the Petitioner's interest in the value of the shares and for purposes of ascertaining the value of the Petitioner's shares;
- (c) an independent property valuer be appointed for the purpose of ascertaining the most recent value of the company's Delamere Court flats situate on plot No. BC 225, Top Mandala in the City of Blantyre;
- (d) leave be granted to the Petitioner to obtain statements from the Malawi Post Office and the National Bank of Malawi of the state of the Company's transactions from April, 1987 to the date of the order;
- (e) Mr James Allan Sauze, the Chairman of the Company, do furnish to the auditors and the Petitioner names, addresses and particulars of all tenants who have occupied the Company's 12 flats aforementioned together with the amount of rent payable by each tenant since 1st April, 1987 to the date of the Court's order;



- (f) an independent auditor or accountant be appointed to carry out the valuation of the Petitioner's shares for purposes of carrying into effect the judgment of Mr Justice Mtegha aforesaid; and
- (g) costs of and occasioned by this application and proceedings be paid by Mr James Allan Sauze".

The motion has been supported by the Petitioner's affidavit and it has been opposed by the Respondent's affidavit. The judgment of Mtegha J, referred to above, (hereinafter to be referred to as "the judgment") provides sufficient facts respecting this matter. Let me only mention that the Petitioner had then petitioned the Court to make an order that Mapanga Estates Limited be wound up if, in the opinion of the court, it was just and equitable to do so. In the judgment, Mtegha J declined to make an order for the winding up of the company as sought by the Petitioner, but instead he ordered that the Petitioner should sell her shares in the company and that the first option to buy should be offered to the respondent, the other shareholder. The judgment acknowledged the fact that there were only two shareholders, namely, the Petitioner and the Respondent, who held 49,000 and 51,000 shares, respectively. On the other hand, the judgment did not specify the period within which the order made therein had to be carried out. I hasten to mention that the order has not yet been fully complied with, hence these proceedings to compel compliance.

During the hearing of the motion, both counsel addressed me on the matter and I now consider their submissions in the light of the affidavits of the Petitioner and the Respondent, and in the sequence of paragraphs (a) to (g) of the motion setout above.

Under paragraph (a) the Petitioner is asking the Court to order that the Respondent complies with the judgment within a period to be specified by the Court in the order after which period the Petitioner should be at liberty to sell her shares to any other person, if the Respondent shall not have bought them by then. Mr Msaka submitted, in support thereof, that the judgment had not been the subject of any appeal by the Respondent and further that there was no court order for the stay of execution of the judgment. On his part Mr Msiska, in support of the Respondent, submitted that the order required by the Petitioner in that regard should not be made now, but be deferred until the determination by the Supreme Court of Appeal of the Respondent's appeal against the judgment of Mbalame J in **Civil Cause No. 597 of 1986**, in particular respecting the shareholding of the company. In that connection, Mr Msiska contended that the Respondent, by his said appeal, is disputing the finding by Mbalame J, in that case, that Mapanga Estate Limited had two shareholders, namely, the Petitioner and the Respondent with 49% and 51% shareholding, respectively. It is, therefore, the contention of the respondent that all the shares in the Company belong to him as the petitioner held the 49,000 shares as a mere nominee of the Respondent. On the other hand, Mr Msiska clearly admitted the fact that there was no appeal made by the Respondent against the judgment, the subject matter of these proceedings and that there was no order of the court for the stay of execution thereof. Even if there were any appeal made to, and pending the determination of, the Supreme Court of Appeal in respect of the judgment, the same would not have automatically operated as a stay of execution of the judgment without more. Order 59 r.13 of the Rules

of the Supreme Court expressly provides that except so far as the Court below or the Court of appeal or a single judge may otherwise direct, an appeal shall not operate as a stay of execution. That is why in Anno Lyle (1886) 11 P. D. 114, Page 116 it was, in that respect, observed that the court does not "make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled.". Accordingly, I reject the submission by and for the Respondent on this point and I will, therefore, grant the order prayed for by the Petitioner thereon.

The Respondent has no objection to the order sought by the Petitioner under paragraph (b) of the motion. In fact by his deposition in paragraph 3 of his affidavit, the Respondent clearly makes it known that comprehensive audit accounts for the financial years 1987 to 1994 had already been done and that these would readily be made available to the Petitioner by the Company's auditors. I will, therefore, simply determine the period during which these must be made available to the Petitioner.

Under paragraph (c) the Petitioner is asking the Court to order that an independent property valuer be appointed to ascertain the most recent value of the Delamere Court flats on Plot No. BC 225 in the City of Blantyre. The Respondent, in paragraph 5 of his affidavit, deposed that the said flats were already valued by mutually agreed valuers, Messrs Landed Property Agents in 1993. The Respondent, therefore, contended that the said valuation report would still be relevant to-day. The Respondent, however, felt that should another valuation be required, the same valuers should be allowed to carry it out. On his part and in support of the Petitioner, Mr Msaka submitted that in view of the devaluation of, and depreciation in, the value of the Malawi Kwacha and the general appreciation of the properties concerned, the valuation reports for last year were obviously out of date. There was, therefore, need for a current valuation for the purposes of these proceedings. I concur with Mr Msaka on this point and accordingly, I order that a current valuation be done. On the question of who should carry out the valuation, Mr Msika, counsel for the Respondent convinced me that it would be in the best interest of both parties if the same were done by Messrs Landed Property Agents during a period to be determined under this ruling. I did not see any serious objection thereto by Mr Msaka. Accordingly, I order that the valuation be done by Messrs Landed Property Agents.

Under paragraph (d) the Petitioner is seeking an order of the Court for leave to be granted for her to obtain statements from the Malawi Post Office and the National Bank of Malawi respecting the state of the Company's transactions from April, 1987 to the date of this ruling, in respect of which the Respondent has deposed in paragraph 6 of his affidavit that the Petitioner would get and obtain those statements from the Malawi Post Office and the National Bank of Malawi as sought by the Petitioner in her motion. My task, therefore, would be to merely fix the period within which the same should be done.

Under paragraph (e) the Petitioner is asking the Court to order the Respondent to furnish her and the company auditors with names, addresses and particulars of all tenants who have occupied the Company's 12 flats together with the amount of rent paid by each tenant since 1st April, 1987, to the date of this ruling. By paragraph 6 of his affidavit, the

Respondent has agreed to furnish the petitioner with the names, addresses and particulars of all tenants as sought by the petitioner. However, the respondent has not so agreed to also furnish the petitioner with the amount of rent paid by each tenant as sought by the petitioner and no reasons have been advanced therefor. I, therefore, order that the Respondent also furnishes the Petitioner with the amount of rent paid by each tenant as sought by the Petitioner, and I will in this ruling also determine the period within which the same should be done.

Concerning paragraph (f) under which the Petitioner is asking the Court to order that an independent auditor or accountant be appointed to carry out the valuation of the Petitioner's shares, the Respondent by paragraph 4 of his affidavit deposed that there was no justification for an independent auditor or accountant to carry out a valuation of the petitioner's shares. During, the hearing Mr Msaka conceded that it would be expedient for the company's auditors to carry out the valuation. Consequently, my task would only be to fix the period within which the same should be done by the company's auditors.

Finally, the Petitioner has sought a court order that the respondent be condemned for the costs of these proceedings, it being her view that these proceedings had been necessitated by the conduct of the Respondent who hitherto did not show willingness to comply with the judgement. I find it as a fact that the delay in the execution of the judgement could indeed largely be attributed to the attitude and conduct of the Respondent as evidenced by paragraph 2 of his affidavit in these proceedings and also paragraphs (3) (4) (6) and (8) of Petitioner's affidavit in these proceedings.

Accordingly, except as otherwise ordered hereinbefore, I grant and make all the orders sought by the petitioner in terms of her motion and further order that everything required to be done under all those orders be done as ordered and as soon as is reasonably practicable but so however not later than sixty days from the date of this ruling after which the Petitioner shall be free to sell all or any of her said shares to any other person if the Respondent shall not have bought all or any of those shares by then. The Respondent is condemned in costs.

MADE in Chambers this 1st day of November, 1994 at Blantyre.


A K Tembo
ACTING JUDGE