IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1199 OF 2001

BETWEEN:

I CONFORZI (TEA TOBACCO LTD).....PLAINTIFF

AND

FINCOM BANK OF MALAWI LTD.....DEFENDANT

CORAM: MKANDAWIRE, J
Kasambara of Counsel for the Plaintiff
Kazoka of Counsel for the Defendant
Kaundama, Official Interpreter

RULING

On 9th May, 2001 the plaintiff obtained an interlocutory injunction on an exparte summons restraining the defendant from presenting a petition in connection with the winding up of the plaintiff company. The order was to run up to 16th May 2001 when an interparties application would be heard.

This is now an inter parties application to decide where the order granted on 9th May, 2001 is to continue or not.

Both parties have filed affidavits in support of their case. Paragraph 4 of the plaintiff's affidavit states that the plaintiff is indebted to the defendant up to a sum which as at 14th March 2001 amounted to US$1,313,532.28 arising out of credit transactions that have taken place between the plaintiff and the defendant. The initial credit facility dated 23rd December 1997 was for the sum of US$1,000,0000.00. The facility was to be used only for the purpose of financing the working

capital for the crop season of 1997/98. Later in the season another credit facility of US$300,000.00 was extended to the plaintiff. Naturally the debt was secured by a mortgage and would attract interest. The facility was available for 180 days with a roll-over provision of additional 90 days giving a total of 270 days. According to the defendant's affidavit in opposition the debt was due for repayment on 18th December, 2000. On 19th December, 2000 the defendant wrote the plaintiff that the debt was due for payment. Paragraph 1 of the letter reads as follows:-

> "As you know your US Dollar denominated trade finance facility of US$1,283,527.40 fell due for repayment on Monday 18th December 2000. Your request to extend the loan will only be facilitated once we have received your signed acknowledgment that all current and future export receivables denominated in foreign currency will be credited to our applicable foreign currency account."

The plaintiff failed to meet the conditions set for extension. The debt therefore remained outstanding and unpaid. In a letter dated 14th March, 2001 the defendants made a final demand and part of the letter reads as follows:-

> "I regret to advise that the request to extend the terms and conditions of your outstanding trade finance facility with ourselves has not been approved. You are therefore advised that the total amount outstanding currently expressed as US$1,313,532.38 will be converted to Malawi Kwacha on 22nd March 2001 at the prevailing exchange rate and should be repaid in full together with all accumulated interest due, on or before 15th April 2001.
>
> In the event that the debt and accumulated interest has not been fully repaid by the stipulated expiry date of 15th April 2001 then matters will be handed to our attorneys for collection and legal costs arising therefrom will be for you account."

Indeed the defendant handed over the matter to their lawyers and on 18th April, 2001 Messrs. Lawson and Co wrote the plaintiff in the following terms:-

> "Our instructions are that you were given about a month to settle the debt you owe our clients. As of March 14th, 2001, the debt stood at US$1,313,532.38. Since then it has been and continues to attract interest. The last day for you to effect payments was 15th April, 2001. The amount still remains outstanding. At law the statutory period for demanding settlement of a debt by a company before putting it into liquidation is 21 days. It would thus be seen that our clients were more than generous to you. Our clients are thus now entitled to put your company into liquidation.
>
> ..... Our clients are willing to negotiate with you on the settlement of the debt as long as your proposals are sound. The chance to you is open up to the end of this month failing which we shall proceed to petition the High Court for the winding up of your company."

The plaintiff failed to come up with sound proposals acceptable to the defendant. Instead the plaintiff rushed to court for an injunction to restrain the defendant from commencing or proceeding with winding up proceedings.

At paragraph 12 of his affidavit in support of the exparte application Mr Kazoka states that notwithstanding the fact that 21 days have expired since a written demand was made, the plaintiff cannot be said to be unable to pay its debts. From paragraph 13 to 17 Mr Kazoka states that the plaintiff has found a prospective purchaser who intend to purchase the plaintiff company as going concern. I find paragraph

14 interesting and it reads as follows:-

> "14. The successful conclusion of the proposed purchase of the plaintiff will be advantage to all parties having an interest in the plaintiff i e:
>
> i) The business of the plaintiff will be taken over as a going concern and the employment of the plaintiff's present large workforce will be maintained.
> ii) Funds will be available from the proceeds of the sale to pay off the plaintiff's secured creditors and the defendant and other unsecured creditors."

The plaintiff excepts that negotiations with the prospective purchaser will take about 6 months.

It was submitted by Mr Kasambara that all the evidence leads to the fact that the plaintiff has failed to pay its debt since December, 2000. As for the proposed sale of the plaintiff, it is submitted that there is no guarantee that the proposed sale will be a real success. The plaintiff has not disclosed the proposed purchase price and according to Mr Kasambara no mechanism has been put in place to protect the defendant. It is Mr Kasambara's view that in terms section 213 (3) of the Companies Act, the plaintiff is unable to pay its debts and the defendant is entitled in law to put it in liquidation. As for the injunction it is submitted that there is no triable issue as the plaintiff does not have a legal right to be protected. I have been referred to a number of authorities.

On the other hand Mr Kazoka says that there is a serious issue to be tried. According to him, the question really is whether plaintiff has neglected to pay the debt. The view taken by the plaintiff is that it has not neglected to pay the debt since there is a prospective buyer.

The provisions of section 213 of the Companies Act are pertinent in

this matter. I shall only set out the relevant parts:

> "213. (1) The court may order the winding-up of a company if-
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> (d) the company is unable to pay its debts;
>
> (3) A company shall be deemed to be unable to pay its debts if-
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding one hundred Kwacha then due has served on the company a written demand under his hand requiring the company to pay the sum so due, and the company has for twenty-one days thereafter neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor.
>
> (a) it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company."

It appears clear to me that in terms of section 213 (3) of the Companies Act, the plaintiff is indeed unable to pay its debt. It is also clear from Mr Kazoka's affidavit that the plaintiff has failed to pay the debt. The debt has been outstanding since 18th December 2000 when it was due for payment. On 14th March, 2001 the defendant made written demand requesting the plaintiff to make full payment on or before 15th April, 2001. The plaintiff did not pay and no reasonable arrangements or proposals to the satisfaction of the defendant were made. In these circumstances, it is my view that the defendant is

entitled to enforce its rights. The defendant was perfectly entitled to petition the court for a winding up order. It matters not that other creditors are prepared to give the plaintiff more time. Further it matters not that there is a prospective purchaser. In my view to insist that the debt would only be paid with proceeds of sale of the company as stated in paragraph 14 of Mr Kazoka's affidavit provides further evidence that as at now, the plaintiff is unable to pay its debts. That is what it mounts to.

This case is very much like the case of **Cornhill Insurance PLC v Improvement Services Ltd and Others** (1986) 1WLR 114. The facts of that case as they appear in the head note are as follows:

> "The plaintiff, a well known insurance company with a substantial business, had paid to the defendants the greater part of their claim under the terms of insurance policy. On 12 June 1985 the parties orally agreed to settle the outstanding part of the claim for £1,154. On 14 June the defendants made a written request for payment and upon receiving no reply wrote to the plaintiff on 26 June pursuant to section 518(1)(a) of the Companies Act 1985 giving notice that unless the sum was received within 21 days they would present a petition to wind up the company on the ground that it was unable to pay its debts. On 12th July, just before the expiry of the 21 days, the plaintiff obtained an ex parte injunction restraining the defendants from presenting or threatening to present a petit on to wind up the company. On the plaintiff's application for a continuation of the injunction on the ground that the presentation of such a petition would be an abuse of process since the defendants, knowing the standing of the plaintiff, could not truthfully swear that they believed the plaintiff to be insolvent."

Dismissing the application Harman J, had this to say on page 118:

" In my view the correct test in approaching these matters is exemplified first by Ungoed-Thomas J., who was a great master of equity in *Mann v Goldstein* (1968) 1 W.L.R. 1091, 1096 where he said:

> "When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt."

That appears to me to be sound reasoning and sound law. I reinforce it by a reference to *In re A Company (1950) 94 S.J. 369* where Vaisey J., in a matter in which counsel of the utmost distinction in Chancery at that time, both leading and junior, appeared, said that where a company was well known and wealthy it was the more likely that delay in settlement of its obligations would create some suspicion financial embarrassment:

> "Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them."

In my view those words apply to this case also. This a case of a rich company which could pay an undoubted debt and has chosen - I think I must use that word-not to do so from 12 June to today. In my view in such circumstances

> the creditor was entitled to (a) threaten to and (b) in fact if it chose to present a winding up petition, and In was wrong to make the ex parte order which I made on 12 July and I should not accede to this motion to continue that order today.
>
> I conceded that the matter is sad and unfortunate because it may be there were other and out of court remedies which might effectively have got the money before now. Nonetheless it is my business to give people their rights, according to their proper entitlement in the law and not to force them into other courses, and in my judgement each defendant was entitled to say: "I am undoutedly owed £1,154. If you don't pay me I must suspect you can't. Therefore I can properly swear that you are insolvent and I can properly present a winding up petition to the Companies Court." I so hold and therefore refuse to make any order on this motion in favour of the plaintiff."

Reverting to the present case, Mr. Kazoka has submitted that there is a serious question to be tried. With respect I do not see any. If the plaintiff is able to pay its debt, then let it pay. I am not prepared and it would be wrong in law to force the defendant to wait for another 6 months while the plaintiff is negotiating with a prospective purchaser. And who knows those negotiations may not even be successful. Like Harman J said, I consider it my business to give people their rights, according to their proper entitlement in law and not to force them into other courses.

I was referred to the **American Cynamind** case (1975) 1 ALL ER 504. It appears clear to me that applying the principles of that case, an injunction cannot be granted here. There is no question of maintaining the status quo of the parties because the plaintiff has not demonstrated that the defendant has threatened to interfere with its

legal right. Put it simply there is no triable issue. It follows then that the questions of balance of convenience and damages being an adequate remedy would not apply.

In the result I do not see any basis for continuing the order obtained exparte. I dismiss this application with costs.

Let me make an observation on the question of procedure. Before going into the merits of the case Mr Kasambara attacked the procedure that was followed in bringing this application. I entirely agree with Mr Kasambara the procedure followed in this case was wrong. The application to restrain a party from presenting a winding up petition must be brought on an originating motion to a judge in open court and not on originating summons to a judge in chambers as was the case here - see Practice Direction Companies Court (1887) 1 ALL ER 107 and Practice Direction (1988)2 ALL ER 1024.

The application has already been dismissed but I thought I should comment on matters of procedure.

Made in Chambers this 8th day of June, 2001 at Blantyre.

M P MKANDAWIRE
JUDGE