IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 389 OF 2001

BETWEEN:

NOVATECH ENGINEERING.....PLAINTIFF

-and-

MALAWI HOUSING CORPORATION.....DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**
Mr Kauka, of Counsel for the Plaintiff
Mr Chisanga, of Counsel for the Defendant
Mrs Chaika, Official Interpreter/Recording Officer

RULING

When the plaintiff, Novatech Engineering, commenced this action against the defendant, Malawi Housing Corporation, to, *inter alia*, claim a sum allegedly owing as unpaid price of goods sold and delivered, the defendant, filed a defence and a Counterclaim. The defendant next entered a judgment on the Counterclaim in default of service of defence to it by the plaintiff. The defendant then proceeded to file a writ of *fieri facias* on the strength of which a Warrant of Execution was issued by the court. It appears the warrant was eventually stayed but this was after execution had already been levied on the goods of the plaintiff, although not sold.

The plaintiff subsequently lodged a summons to set aside both the judgment on Counterclaim and the warrant of execution. This summons was argued before the Registrar on 11th April, 2001, who on 26th April, 2001 ruled that although execution had been levied in the case, the Warrant of Execution should be set aside for irregularity and that the defendant pays the Sheriff's fees and expenses. It was the Registrar's view that prior to arranging issue of the warrant the defendant should first have obtained an assessment of damages.

The defendant was not pleased with the order that it pays the Sheriff's fees on its levied warrant. It thus lodged an appeal against it complaining that the Registrar had erred in law in making this order and this court is now being asked to reverse the ruling of the Registrar on this point.

I need to point out at the outset that a kind of hide and seek situation has arisen in the argument of this appeal. It is clear from the point appealed on that although this case is between the plaintiff and the defendant, the point to be considered in it is of no interest to the plaintiff. In fact the success or failure of this appeal will only be felt between the defendant, who has lodged the appeal, and the Sheriff.

One would, therefore have thought that in the circumstances, as a matter of prudence and consideration, the Sheriff would have been alerted of this appeal even though he is not a party to the cause. As has happened, however, the notice of appeal and all subsequent notices of adjournment have routinely been addressed to and served on the plaintiff. And indeed, as expected, when Mr Kauka, of Counsel, appeared for the plaintiff, he made it plain that as long as the defendant was not seeking to shift the burden of payment of the Sheriff fees in question to his client, he had no reason to stand in the way of the Appellant. I think I must therefore, as a court, bear in mind, as I decide this appeal, the fact that the Sheriff, who stands to be affected by the outcome of this appeal, has not had any platform from which to air any arguments in answer to those raised by the Appellant against him in this case. I take it thus that the caution I ought to exercise should be that expected of a court handling an ex-parte application, as in a way this is an ex-parte appeal.

Mr Chisanga, of Counsel, argued the appeal on behalf of the defendant in this case. He presented the appeal from three angles, although throughout relying on the single ground he had filed, to wit, that the Registrar had made an error of law in making this decision. First it was his argument that when there is a wrongful execution the remedy available to the party levied against is to sue for damages for trespass. It was his further argument that it is at the hearing of such type of case that if such party has paid Sheriff fees it is reimbursed the same in the form of damages. It was then revealed that in this case the party levied against did not pay any Sheriff fees, but that the said party has in fact commenced an action against the defendant *vis-a-vis* the execution it suffered. The cause number of the case in question has not been disclosed to the court. It was finally contended that in the light of this action the Registrar's order against the defendant to pay Sheriff fees herein was erroneous and that it therefore ought to be set aside.

If on execution the plaintiff had paid the costs of execution and if through the suit the plaintiff is said to have commenced it now seeks to recover these costs from the defendant as initiator of the execution I would have been in a position to understand a complaint that the Registrar's order is superfluous and possibly a duplication. Where, however, it is conceded that the plaintiff did not pay the Sheriff's fees, as is the case here, I do not see how the suit the plaintiff has commenced against the defendant can be expected to cater for the interests of the Sheriff. It certainly has not been made clear to me how in suing for trespass and other ancillary relief, as I was made to understand the plaintiff has sued the defendant, the plaintiff is going to raise the question of the Sheriff's fees. As already observed the order appealed on is of no interest to the party that was levied on. It would be amazing therefore if the plaintiff found it necessary to incorporate it in his suit. A point not to be lost is that the point appealed on relates rather to the party who levied execution and gives him direction where to look for his fees. I thus completely fail to see how a suit by a party not affected by this order can have the effect of rendering the order erroneous. This argument has not been of any help in this case and so I reject it in full.

The second point Mr Chisanga took up was that in fact in this case Sheriff fees were not and are not payable at all. The argument advanced was to the effect that Sheriff fees, which were alternately referred to as poundage, only become payable where the execution has forced the debtor to pay the debt. It was thus argued that in this case although the Sheriff levied execution, as he did not cause the debtor to pay the debt, no poundage became due. On this point the case of **Re Ludmore** [1884]13 Q.B.D. 415 was furnished as authority and on its basis it was contended that the Registrar erred in law in saddling the defendant with payment of fees, alias poundage, which, so to speak, the Sheriff had not earned yet. On this premise it was prayed that the Registrar's order ought to be reversed.

I must admit that I found this argument powerful and to the point in the appeal. If indeed the law be as advocated by Mr Chisanga on the point at hand there is no way the Registrar's order can be allowed to stand. This being the case I have given the argument in question due attention and consideration and I have also taken ample time to read the authority cited alongside related authorities on the subject.

Put in question form the nice question Mr Chisanga's argument raises is "when does the Sheriff become entitled to his execution costs or in particular to his poundage?" Going by the **Re Ludmore** case authority cited, Mr Chisanga appears to have a point. The case in question, however, is an 1884 case and a cardinal consideration to take into account is whether it is in accord with our own law as per

the statutes passed in Malawi seventy to eighty years later. If our law as regards the question posed is on all fours with the law in England in 1884 then I have no problems with following the authority of **Re Ludmore**. If however our statutes provide differently then I ought not just to blindly follow the authority cited.

Of immediate concern in this case are:-

(a) Section 32(2) of the Courts Act 1958 (Cap. 3:02) of the Laws of Malawi, which empowers the Chief Justice to revoke, replace, or amend the Schedule to the Act;

(b) Item 23 of the Schedule to the said Courts Act, which relates to Sheriff's fees on execution of Writs of *fieri facias*; and

(c) Section 47(1) (b) of the Sheriffs Act 1968 (Cap. 3:05) of the Laws of Malawi which empowers the Chief Justice to make rules prescribing the fees, poundages, and allowances which the Sheriff may demand, take and receive.

Some controversy used to exist around the interplay of the above provisions *vis-a-vis* the question of the Sheriff's entitlement to poundage. That however appears to have been well resolved with reference to Section 21(a) of the General Interpretation Act (Cap 1:01) of the Laws of Malawi by the Hon. Skinner, C.J. in the case of **Maunde -vs- National Bank of Malawi and Others** [1981-83]10 M.L.R. 392. Without wishing to go into much detail, the situation in that case was that the appellant paid the Sheriff fees including poundage on an execution that did not proceed to sale of the seized goods. He later sought to be refunded that sum on the basis that poundage was not due in the circumstances. After evaluating the law on the subject the learned Chief Justice said in reference to the Schedule to the Courts Act:-

> *"The schedule fixes the scale of fees payable to the Sheriff and makes it clear that the fees are chargeable, once seizure is made, even where the execution is withdrawn, satisfied, or stopped."* at p. 396.

It is significant, in my view, that the Supreme Court approved the **Maunde** case in **Sheriff of Malawi -vs- Press Produce Limited** [1987-89]12 M.L.R. 241 and thereby elevated the strength of this authority.

As will be seen from the above authorities, which are from within the local jurisdiction, the law in Malawi regarding when execution costs or poundage become due is different from what it was in England in 1884. On this basis I find myself unable to accept the authority of **Re Ludmore**. Like Hon. Skinner, C.J. held in the **Maunde** case I also hold here that although there was no recovery of money in the levy the Sheriff carried out and although he did not sell the goods he seized, Sheriff's fees, including poundage, were due and payable. In the situation I can see no one more liable to pay those fees than the one who caused the Sheriff to proceed on such unripe execution, to wit, the defendant as the Registrar properly ordered. In my view therefore the defendant's second argument also fails.

The last argument which Mr Chisanga took up on behalf of his client was that the Registrar's order that the defendant pay Sheriff fees was outside the prayers laid before him. He argued that the prayer before the court was merely to set aside the judgment on Counterclaim and that it did not extend to the question who should pay the Sheriff's fees. In this regard the case of **Malawi Railways Limited -vs- P.T.K. Nyasulu** MSCA Civil Cause No. 13 of 1992 was cited as authority.

In considering this argument I have found it important to bear in mind that a Sheriff in cases like the present does not just wake up and embark on indiscriminate levying of execution on whoever happens to stand in his way. As was aptly observed by the Supreme Court (Hon. Unyolo, JA. delivering the judgment) in **Sheriff of Malawi -vs- Press (Produce)limited** above-cited, "the Sheriff normally goes out for execution on the initiative of one of the parties." at p. 247. This being the case I think it would be rather naive of the parties to expect that they have a free licence to play games with the Sheriff by sending him on errands, even useless errands, and later evading liability to pay him on basis that his fees are nowhere mentioned in any summons in their case. Actually as S 6(2) of the Sheriffs Act puts it when acting on a Warrant of Execution, as was the case here, the Sheriff is empowered, among other things, "to enforce payment of the amount due under the judgment and of costs of the execution." (emphasis supplied)

Bearing in mind the Sheriff's above statutory entitlement to costs of execution, and the fact that the Sheriff not being a party to the cases he executes upon it would be unduly burdensome for him to get his fees only through special prayer to the court, I think the Registrar did not err in law in providing for him when determining a summons that was between the plaintiff and the defendant. The **Nyasulu** case cited, I think, is good law for the proposition that in a trial a court should not invent extra pleadings for the parties. I do not think it is good

authority for the point that a court should not apply a piece of applicable law, e.g. S 6(2) herein, just because it has not been referred to in some material process. Again on this point I feel that the Registrar did not err in law. No error having been shown I accordingly uphold the Registrar's ruling on this point and dismiss the defendant's appeal. Further, as I earlier observed, this appeal having been basically ex-parte, I make no order as to costs.

Made in Chambers this 17th day of August, 2001 at Blantyre.

A.C. Chipeta
JUDGE