IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 680 OF 2000

BETWEEN:

CANDLEX LIMITED.....PLAINTIFF

-and-

MARK KATSONGA PHIRI.....DEFENDANT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

M/s Savjani S.C. and Ndau, of Counsel for the Plaintiff

Mr Mhone and Mrs Mulere, of Counsel for the Defendant

Mr Balakasi, Official Interpreter

Miss Mzungu, Recording Officer

Date of Hearing : 28th January 2002, 1st February 2002, 4th February 2002, 11th February 2002 and 13th February 2002

Date of Ruling : 2nd April 2002

Kapanda, J

RULING

Introduction

In the two actions before this court, which were both commenced on 10th March 2000, by way of writ of summonses, being Civil Causes Nos. 680 and 713 of 2000, the Defendant has been represented by the firm of Racane and Associates since the commencement of the said actions. The same is true with the Plaintiff Company which all along has been represented by Messrs Savjani and Company. The actions were consolidated and they are being tried as one action. The trial of the consolidated actions commenced on 30th April 2001 after bundle of pleadings were filed on 21st August 2000 in respect of Civil Cause No. 680 of 2000 and on 28th August 2000 in connection with Civil Cause No. 713 of 2000.

The Plaintiff closed its case on 3rd October 2001 and it then remained for the Defendant to start, on the following day, his defence to the action. It never happened for the Defendant wanted to have the first witness, who was called by the Plaintiff, recalled. A

protracted argument then ensued as to whether the said witness should be recalled or not. At the close of submissions, in respect of the application to have the first witness recalled, the court reserved its ruling on the application. The ruling was to be delivered on the day the court was to resume sitting and continue with the trial of the consolidated action.

On 28th January 2002, when the case was called and before the court could deliver its reserved ruling, there was yet another application, by the Defendant by way of a motion, which is now the subject matter of this ruling. The court managed to deliver the reserved ruling and it then proceeded to hear the motion filed by the Defendant on 28th January 2002.

The Motion

The Defendant, through Counsel, is moving this court to dismiss the action herein. The motion, it is the contention of Mr Mhone, is made pursuant to the provisions of the Rules of the Supreme Court Volume 2, part G of the 1999 edition which confers on this court summary jurisdiction over lawyers who appear before it. The specific provision under which the motion is taken out has not been indicated on the face of the Notice of Motion.

Mr Savjani S.C. took an issue with the fact that the Notice of Motion did not indicate under what provision it was taken out. This was a pertinent observation. It is trite knowledge that the relevant law or rule under which a motion is brought must be indicated on the face of the Notice of Motion. In the interest of justice the court proceeded to hear the motion notwithstanding this procedural error committed by Mr Mhone. It is hoped that learned Counsel will not fall into this error again.

The grounds upon which the Defendant's application is based have been indicated as follows:-

1. Savjani and Company were not given instructions to commence an action against the Defendant by the Plaintiff's Board of Directors.

2. The intructions were given by a Shareholder/Director without the authority of the Board of Directors.

3. In the alternative, the instructions to Savjani and Company by the Shareholder/Director have not been ratified.

The motion is opposed and the court has heard arguments for, and against, the motion. I shall deal with the submissions of Counsel later in this ruling. At this juncture let me proceed to consider the facts obtaining in this matter under consideration.

Facts of the case

The detailed facts of this matter are to be discerned from the affidavits, and supplementary affidavits, filed with the court in support, and in opposition, to the Notice of Motion. These are the affidavits, and supplementary affidavits, in support of the motion sworn by Messrs Raphael Joseph Mhone and Mark Katsonga Phiri. On the other hand there are the affidavits, and supplementary affidavits, in opposition to the motion

deponed to by Messrs Rosemary Kanyuka, Michael Hubbe Felix Sakyi and Benard Mkweche Winston Ndau. The record will show that there are so many of these affidavits and for this reason I do not propose to set out in full the contents of the said affidavits. Further, the affidavits are not only numerous (there are eight

of them) but there are also far from being harmonious. Furthermore, some of the affidavits were sworn and filed in the course of arguments, and the hearing of this motion.

Inspite of the foregoing observations this court will endeavour to set out the salient parts of the matters of fact deponed in the affidavits. I will now move on to set out the said facts.

It is common cause that the actions that the Defendant wants dismissed were commenced on 10th March 2000. Further, it is common ground that the parties, by consent, caused consent orders for directions to be issued, by the court, sometime between 4th and 8th August 2000. Furthermore, it is obvious that before the trial of this action commenced, on 5th May 2001, either party, in view of the said consent order for directions, had an opportunity to carry out discovery and inspection of documents that were in the possession, custody or power of the other party.

The Defendant depones that the Plaintiff's Board of Directors never gave instructions to Savjani and Company to commence this action against the Defendant and that the action was commenced without the authority of Management or the Board of Directors of the Plaintiff Company. It has further been averred by the Defendant, in one of the affidavits in support of this application, that the said Board of Directors never ratified the action taken by the firm of Savjani and Company. In support of this statement of fact the Defendant has exhibited to the affidavit of Mr Raphael Joseph Mhone, filed on 28th February 2002, Minutes of a Shareholders meeting and memos marked RMJ1, RMJ2 and RMJ3 respectively, which he alleges shows that there was no ratification of the action taken by Savjani and Company to commence these actions on behalf of the Plaintiff Company. The Defendant, in his supplementary affidavits to the one sworn by Mr Raphael Joseph Mhone, has gone further to give a narrative of the subscribers to the Memorandum and Articles of Association of the Plaintiff Company, the work grades of the Plaintiff Company, the body that is mandated to manage the business of the Company and so many other matters which he

thinks are relevant to the present application. I will later specifically refer to these other matters should it become necessary to do so.

The affidavits in opposition to this motion contain matters of fact that are desputing what the Defendant has put in his affidavits in support of the Application under consideration. Basically the facts that the Plaintiff company is relying in opposing this motion are discerned from the affidavits filed on behalf of the Plaintiff and they are that, quite

contrary to what the Defendant has deponed, Messrs Savjani and Company instituted the proceedings on instructions from the Plaintiff's Board of Directors which decided to take legal action against the Defendant. The Minutes of the relevant Board of Directors meeting have been annexed to the affidavit of Mr Benard Mkweche Ndau sworn on 31st January 2002. The said minutes are in respect of the meeting of the Board of Directors of the Plaintiff Company held on 1st March 2002 and the contents of same are as follows:-

"Candlex Limited

Minutes of an Extraordinary Board Meeting of the Directors of the Company Held on 1st March 2000 at Lilley, Wills and Company Blantyre at 3. PM

Present : Mrs R. Kanyuka Chairperson

Mr M. Hubbe

Mr R.S. Abbey

Apologies : Hon. J.J.J. Sonke

1. Constitution of Meeting

The Chairperson called the meeting to order and a qourum being present, declared the meeting duly constituted.

2. The Group Chairmanship

The Acting General Manager informed members of Mr Phiri's behaviour in calling himself Group Chairman of the company and being in charge of management.

The Acting General Manager tabled the memos that were exchanged between himself and Mr Phiri and also between the Chairperson and Mr Phiri.

It was RESOLVED that though the board had earlier resolved to settle the issues of Mr Phiri's behaviour which was bringing a lot of confusion amongst the staff at Candlex:

1. Mr Phiri should be asked to vacate the premises.

2. Legal action should be taken against him to evict him from the premises.

3. The Acting General Manager and Mr Abbey should go and see Messrs Savjani and Company and instruct them to commence legal proceedings against Mr Phiri on eviction and legal proceedings to stop Mr Phiri from passing himself off as Group Chairman of the Company.

3. Any Other Business

There being no other business the meeting was declared closed.

(Signed)

CHAIRPERSON"

It was also deponed by Mr Felix Sakyi, on behalf of the Plaintiff, that the statement of fact contained in one of the Defendant's affidavits, to the effect that the Plaintiff Company's auditors denied knowledge of the court proceedings, is not true because actually what happened was that at a meeting, where the Defendant queried why the issues of Group Chairman/Managing Director and possession of premises (the questions that are before this court) were not mentioned in the audited accounts of the Plaintiff Company. Mr Felix Sakyi further stated in his affidavit that he replied and stated that these issues did not require to be mentioned in the accounts since they did not have any financial impact on the company. It was further deponed by the said Mr Felix Sakyi that the Plaintiff Company's auditors are fully aware of the present action against the Defendant. It will also be noted that the Plaintiff further deponed, through the affidavit of Mrs Rosemary Kanyuka, that the directors of the Plaintiff have since signed a written resolution to confirm, and ratify, the instructions given to Savjani and Company to commence the action against the Defendant.

The above are the main facts obtaining in the affidavits that were filed in support of, and against the, motion. Further facts will appear later in this ruling when I am dealing with the issues for determination. As will have been seen from the foregoing sketch of the facts of this application there is a conflict of the said facts. I must resolve these incompatible statements of fact and make findings of fact on what the true position is. This will be done at the time this court will be considering the questions that must be adjudicated upon.

Questions for Determination

At this point in time it is necessary that the said questions for determination should be set out in this ruling. The issues are those that have been raised by the Notice of Motion and the affidavit evidence that was offered in support of, and against the, motion. As I see it, the matters that are in dispute in this application, and which must be determined by this court, may be summarised as follows:-

(a) Whether the firm of Messrs Savjani and Company was given instructions to commence this action, against the Defendant, by the Plaintiff's Board of Directors.

(b) Whether, if it be found that there were no such instructions, this action should be dismissed.

I wish to point out that the isolation of these issues should not be taken to mean that these are the only issues. There are of course other ancillary questions, which do not require to be highlighted, that will also be dealt with when the court is considering the two main issues mentioned above.

Before embarking upon the exercise of considering the issues set out above, and all the other related issues that will arise, let me express my gatitude to both Counsel for their careful and thorough viva voce submissions made in support of their respective points of view regarding the motion herein. Any clarity in this ruling is largely due to the efforts of Counsel. It will not, however, be possible to refer to each and every argument, put forward by Counsel, in this ruling. If an attempt was made to incorporate all the arguments in this ruling that would make this ruling unnecessarily long in view of the

fact that the submissions were very lengthy. Further, I take the

view that some of the arguments that were advanced by Counsel are not relevant to this application but may be they could be useful in the main action.

Consideration of the Issues

Were there instructions from the Plaintiff's Board of Directors?

It is the Defendant's case, argued by Mr Mhone of Counsel, that the Board of Directors of the Plaintiff Company never authorised the commencement of this action against the Defendant, as was required in terms of Article 72 of the Articles of Association of the Plaintiff Company, thus this action must be struck out for it is a nullity. The case of John Shaw and Sons (Salford) -vs- Shaw [1935]All. E.R. 456 was cited in support of this argument. Mr Mhone has further put it to this court that Mr Michael Hubbe's averment, in paragraph 6 of his affidavit filed on 30th January 2002, that as a majority shareholder he was entitled to give instructions to Savjani and Company to commence action against the Defendant is of no legal consequence in view of the principle of law in the case of John Shaw and Sons (Salford) Ltd (supra). It is Mr Mhone's further submission that an interim board of directors, which the shareholders agreed each was going to nominate a person(s) to sit on the board, never authorised the commencement of this action. The arguments of Mr Mhone, as shall soon be demonstrated, are weak.

Turning to the arguments made on behalf of the Plaintiff Company, it is the contention of Mr Savjani S.C., that the Defendant's application is frivolous as demonstrated by the fact that it was made late and as shown by the number of affidavits that were filed at different stages since the application was instituted. It is also the contention of Counsel for the Plaintiff Company that the fact that Counsel for the Defendant never raised any question regarding want of instructions or ratification, at the time the Plaintiff's witnesses were before this court to testify on behalf of the Plaintiff Company, shows that the Defendant's application is indeed frivolous.

Mr Savjani S.C. has urged this court to dismiss the Defendant's application on the ground that it was not made promptly even though the facts, and the documents, on which the application rests were known to the Defendant at an earlier stage. The case of Russian Commercial and Industrial Bank -vs- Comptoir D'Escompte De Mulhouse [1925]A.C. 122 was

cited in support of the prayer that the application should be dismissed for being made late. I totally agree with Mr Savjani S.C. that even if this court were to find that there was want of authority to commence the action against the Defendant this application would be dismissed on the ground that it was not made expeditiously. I will come back to this issue later in this ruling.

Interim Board of Directors

Learned Senior Counsel further submits that there was no subsisting agreement about appointments to the Board as was being suggested by Mr Mhone, when the latter relied on exhibit MPK 25 - the minutes of an Extraordinary Shareholders Meeting of the Plaintiff Company of 9th June 1998 - and contended that the Plaintiff Company still has an Interim Board of Directors and that this Interim Board of Directors did not pass a resolution to commence this action, but that actually at the Shareholders meeting of 4th December 1998 the Shareholders appointed Directors and a new Board was put in place to replace the said Interim Board of Directors. I have had the ocassion to read the Minutes of the Shareholder's Meeting of the said 4th of December 1998, which the Defendant attended. They are annexed to the affidavit of Mr Ndau filed on 7th February 2002 and are marked as BMWN1. In minute 2, inter alia, it is recorded as follows:-

"--2 APPOINTMENT OF DIRECTORS

2.1 Mr Phiri (the Defendant) suggested that since MDC has

not joined the Company the Interim Board comprising Mr Phiri, Mr Hubbe, Mr Abbey and Mrs Kanyuka be dissolved and a new Board be appointed.

RESOLVED

That the Interim Board be and is dissolved and a new Board be appointed---" (emphasis and underlining supplied by me)

Pausing here, let me observe that I entirely agree with Mr Savjani S.C. when he submits that, pursuant to Section 125(2) of the Companies Act, 1984, the above quoted minutes, whose existence have not been disputed by the Defendant, clearly show that there is prima facie evidence of the fact that the interim board was dissolved and a new board was appointed to replace the interim one. This, therefore, means that there can be no question of a resolution of an interim board not having been made to authorise the giving of instructions to M/s Savjani and Company to institute the action against the Defendant. There was no Interim Board of Directors of the Plaintiff Company, in existence then, to pass the resolution being referred to by learned Counsel for the Defendant.

Appointment of Directors: Alteration of Articles

Turning again to the arguments of Counsel, it is the further contention of learned Senior Counsel that the purported agreement, with respect to appointment of directors by a particular shareholder, which essentially had the effect of altering the Company's Articles of Association, is in any event contrary to the Articles of Association of the Plaintiff Company which have not been amended by a special resolution as is required by the provisions of Section 13(1), as read with section 122, of the Companies Act, 1984. In point of fact, it has been submitted, on behalf of the Plaintiff Company, that the Company's Articles of Association do not provide for the appointment of Director(s) by a particular shareholder. The

directors, in terms of Section 113(6) of the Companies Act, 1984, are elected at an Annual General Meeting which was done in this case.

Mr Mhone, in reply, has contended that on the authority of the cases of In Re Express Engineering Works Ltd [1926]1 Ch. D. 466 and In Re Duomatic Ltd [1969]2 Ch. D. 365 this Court should find that the Articles of Association of the Plaintiff Company were altered on the authority of the common law and that the matter of the appointment of directors was then placed in the hands of a particular shareholder. The cases cited by Mr Mhone do not support his sweeping proposition that, at common law, Articles of Association can be altered in the manner the shareholders purported to do. The following dictum of Younger L.J. In Re Express Works Ltd (supra) at page 471 is very instructive:-

"---In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by Statute becomes binding on the company---" (emphasis supplied by me)

The above quoted statement, of Younger L.J., was cited with approval In Re Duomatic Ltd (supra) by Buckley, J. at page 371 F-G.

As I understand it, the case of Express Engineering Works Ltd (supra) establishes the principle that where all corporators in fact appear, and there is no need for further statutory formality, the mere absence of a formal resolution is immaterial as regards the binding effect of a resolution. In Malawi, as was rightly put by Mr Savjani S.C., alteration of Articles of Association must be by special resolution and such resolution must be registered with the relevant authorities: Sections 13(1) and 122 of the Companies Act, 1984. That is the requirement of statute. If the formal steps had been taken, as required by the provisions of Section 13(1) as read with Section 122 of the Companies Act, 1984, the agreement would have been enforced. The above quoted provisions of the said Companies Act 1984, were not complied with and this court will not allow that it be used to perpetuate a breach of mandatory statutory provisions. Thus this statutory formality, requiring that a special resolution amending or altering the Memorandum or Articles of Association should be delivered to the Registrar for registration, takes the present case out of the principles set down in Re Express Engineering Works Ltd (supra). Further, I wish to observe that the Express Engineering Works Ltd and Duomatic Ltd cases were dealing with the issue of the effect of not giving notice of meeting of shareholders to a particular shareholder. These cases must be read in that context. Moreover, the facts of those cases are materially different from what is obtaining in the case before me. The long and short of it is that the two cases cited above are distinguishable from the present case. For these reasons the court does not accept the argument that the Articles of Association were altered on the authority of the common law thereby allowing the appointment of director(s) by a particular shareholder.

Decision to take action against Defendant

This now leads me to the additional arguments of Mr Savjani S.C. It is the further contention of learned Senior Counsel that according to the Minutes of an Extra-ordinary

Board Meeting of the Directors held on 1st March 2000 the Board of Directors decided to take action against the Defendant. I have already reproduced the Minutes of the said Meeting of 1st March 2000. The Minutes clearly show that the Board of Directors of the Plaintiff Company authorised the commencement of proceedings against the Defendant. Finally, it has been submitted on behalf of the Plaintiff that there is a written resolution, made pursuant to the provision of section 148 of the Companies Act, 1984, to ratify the resolution of the Board of Directors of 1st March 2000, if such is required, authorising the giving of instructions to Messrs Savjani and Company to commence legal proceedings against the Defendant. It is the view of learned Senior Counsel that, having regard to the fact that there is now this written resolution, the question of the Plaintiff Company giving instructions to the firm of Savjani and Company has been put beyond doubt and that any defect that may have been there has been cured. In this regard the cases of Danish Mercantile Co Ltd -vs- Beaumont [1951]All. E.R. 424 and Alexander Ward -vs- Samyang Navigation [1975]2 All. E.R. 424 were cited in support of the proposition that the ratification has cured the defect that may have been there as regards instructions to commence legal action against the Defendant. These two cases are instructive, and relevant to this case. I shall very shortly revert to these cases but as of now I must turn to one of the questions raised by the motion viz whether or not the Plaintiff Company, through its Board of Directors, gave instructions to Messrs Savjani and Company to commence a legal suit against the Defendant.

It is trite law, I need not cite a case authority for it, that he who alleges must prove what is being alleged. This court finds and concludes that the Defendant has failed to prove the allegation that he makes that the firm of Messrs Savjani and Company were never given intructions to institute the proceedings, on behalf of the Plaintiff Company, against the Defendant. To the contrary, and through the courtsey of the Plaintiff Company, there is uncontroverted evidence to prove that in point of fact instructions were given to commence the actions, now consolidated, against the Defendant. Exhibit SC1, annexed to the affidavit of Mr Ndau of 31st January 2002, is pertinent in this regard. Further, in view of the finding that exhibit SC1 proves that instructions were given, by the Plaintiff Company, to Messrs Savjani and Company to institute a legal action against the Defendant, it therefore follows that the question raised by the motion as regards whether instructions were given by a Shareholder/Director without the authority of the Board of Directors needs no further consideration. It is so because the said exhibit SC1 authorised the Acting General Manager (Mr Hubbe) and Mr Abbey, who are both Shareholders, to instruct Messrs Savjani and Company to commence legal proceedings against the Defendant. As such shall be seen very shortly such authority has been confirmed and ratified by the Directors of the Plaintiff Company. What more evidence does one require to satisfy himself that the commencement of his action has the blessing of the Plaintiff's Board of Directors.

The Defendant, instead of proving what he was alleging, wanted the Plaintiff to disprove what the Defendant has been contending. The Plaintiff, although not obliged to do so, has proven that the commencement of the action against the Defendant was authorised. Realising that his allegation can not stand the Defendant made another baseless application. This is made apparent in the Defendant's prayer for production of a Minute

Book. In lieu of praying for discovery of this particular document at an earlier stage, he made an application for production of the Minute Book at the end of his arguments in support of this motion. I believe this was intended to fish out for some evidence to support the allegation that there is of want of authority. If this was not a fishing expedition, on the part of the Defendant, I wonder what it could be called.

For the foregoing reason the Defendant's application would be dismissed.

Ratification

Assuming that I am found to have been wrong in coming up to the conclusions made above I will still proceed to consider one more question viz whether instructions to Messrs Savjani and Company were given by a Shareholder/Director without same being ratified by the Board of Directors. I will start by observing that it is surprising that the Defendant did not abandon ground three (3) of his motion. It is in the affidavit evidence of Mrs Rosemary Kanyuka, in particular in exhibits RK3 (a) (b) and (c) annexed to her said affidavit filed on 30th January 2002 that a written resolution, by the Plaintiff Company's Board of Directors, the Directors have adopted the proceedings, in the main action, on behalf of the Plaintiff company. The said resolution, which is in keeping with Article 82 of the Articles of Association of the Plaintiff Company, is as follows:-

"Candlex Limited

That the undersigned directors having received notice of a proposed resolution of the board of directors of Candlex Limited ("the Company") signify their assent to the confirmations set out below and the passing of the resolutions set out below:-

1. The directors hereby confirm that:-

1.1 they decided to instruct Messrs Savjani & Co., Legal Practitioners, to take action on behalf of the Company to restrain Mr Mark Latsonga Phiri from holding himself out as Group Chairman and/or Managing Director of the Company and to stop him from interfering in the administration of the Company and asked Messrs Michael Hubbe and R. Abbey, directors and shareholders of the Company (and in the case of Mr Michael Hubbe also then Acting General Manager of the Comapny) to meet Savjani & Co. for purpose, which they did.

1.2 they decided to instruct Messrs Savjani & Co. to recover immediate possession of the offices of the Company occupied by Mr Mark Katsonga Phiri and did so instruct Messrs Michael Hubbe and R. Abbey.

1.3 they have been informed from time to time about the progress of the Company's actions against Mr Mark Katsonga Phiri regarding the issues of Grough Chairman/Managing Director and regarding the preminses and the directors confirm that such information of the directors has been given by the Board Chairperson Mrs Kanyuka and Mr Michael Hubbe. Such information also included the information that the initial injunction granted by the High Court in Cause No. 713 of 2000 had not been granted and a decision was made by the board of directors not to proceed with an appeal and to proceed to trial of the action instead.

IT IS HEREBY RESOLVED that, notwithstanding the above confirmations and purely to dispose of the false issues regarding instructions to Savjani & Co. and authority to commence legal actions against Mr Mark Katsonga Phiri that have been raised by Mr Mark Katsonga Phiri through his lawyers, the board of directors of the Company:-

(a) ratify (if ratification is necessary) the actions of Mr Michael Hubbe and/or Mr R. Abbey in giving instructions to Savjani & Co. as mentioned in 1.1 and 1.2 above,

(b) ratify (if ratification is necessary) all actions taken by Savjani & Co. on behalf and in the name of the Company against Mr Mark Katsonga Phiri, including High Court Civil Cause Numbers 680 and 713 of 2000 in which the Company is suing Mark Katsonga Phiri in relation to the issues of Group Chairman/Managing Director and director and occupation by Mr Mark Katsonga Phiri of two rooms in the Company's premises respectively.

(c) adopts those High Court actions, and

(d) instructs Savjani & Co. To continue those actions on behalf of the Company.

Dated the..... day of January 2002."

This resolution, which is signed by all the Directors of the Plaintiff Company, cures any alleged want of authority in the original act of the majority Shareholders - Mr Hubbe. This is the case because if there was any such act of the majority shareholder, then the above mentioned written resolution of the Directors of the Plaintiff Company has the effect of ratifying the said decision of the majority shareholders/Director giving instructions to the firm of Savjani and Company to institute legal proceedings against the Defendant, for the Company's powers were exercised on its behalf and have now been ratified by the company through this written resolution of its Directors: Alexander Ward and Company Ltd -vs- Samyang Navigation Co Ltd [1975]2 All. E.R. 424. In the premises, the Defendant's application would have failed on the further ground that the Directors have since adopted the legal proceedings that were commenced against the Defendant. It is so found by this court that the Board of Directors of the Plaintiff Company, through the written resolution quoted above, have confirmed, ratified and adopted the legal suit commenced against the Defendant through their written resolution dated 29th and 30th January 2002.

Promptness in bringing up application

Finally, let me aboseve, and conclude, that this motion would have been refused in any event on the ground that, as rightly pointed by Mr Savjani S.C., it was not made promptly. If this court had found that there was want of authority to commence the proceedings herein, on behalf of the Plaintiff Company, it could still have proceeded to dismiss the motion on the authority of the cases of Russian Commercial and Industrial Bank, Danish Mercantile Co Ltd (supra) and Banco De Bilbao -vs- Sancha [1938]2 K.B. 176 which are for the proposition that if a Defendant wishes to question the authority to sue in a Plaintiff Company's name then same must be done at an early stage and not at trial. In the matter before this court the Defendant only raised the issue of want of

authority at trial. It is abundantly clear that this action was commenced more than a year ago i.e. on 10th March 2000. Indeed, the record of this case will clearly demonstrate that the Defendant started questioning the authority of the Plaintiff Company to sue after the Plaintiff had closed its case on 3rd October 2001. The court was awaiting to hear the Defendant in his defence to the action after the Plaintiff closed its case. It is clear that what the Defendant did is not to bring an application, raising want of authority to sue in the name of the Plaintiff Company, promptly. There was an inordinate delaly in taking up this motion.

Conclusion

The Motion is refused and the Defendant is condemned to pay the costs of, and ocassioned by this, motion. The court

shall now proceed to hear the Defendant in his defence of the action if he so wishes.

Pronounced in open Court this 2nd day of April 2002 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE