



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 676 OF 2001**

**BETWEEN:**

MR T. CHILENJE t/a COMBINADO PESQUEIRO  
DE METANGULA .....JUDGMENT CREDITOR

VERSUS

THE ATTORNEY GENERAL  
(Director of Fisheries – Mpwepwe Boat Yard).....JUDGEMENT DEBTOR

THE RESERVE BANK OF MALAWI .....GARNISHEE

**CORAM: TEMBO, ASSISTANT REGISTRAR**

Mbendera, Counsel for the judgment –Creditor  
The Attorney General, present in person,  
Assisted by Miss Phoya and Mr Kayira  
Latif, Counsel for the Garnishee



**ORDER**

This is the court's order on hearing the garnishee order nisi herein by which it was ordered that the garnishee show cause why it should not be ordered to pay the sum of K105,538,650.00 to the judgment creditor in satisfaction of a judgment debt due and owing from the judgment debtor to the judgment creditor herein. The moneys in question were garnisheed whilst being held by the Garnishee as a banker of the judgment debtor. Both the Garnishee and judgment debtor appeared to show cause why the Garnishee order nisi obtained herein dated 23<sup>rd</sup> April, 2003 should not be made absolute.

Mr Mbendera of Counsel for the judgment creditor opposed the garnishee's and judgment debtor's quest to show cause why the garnishee order nisi should not be made absolute. Mr Latif for the garnishee swore an affidavit in support of the garnishee's contention. Mr Mbendera also filed an affidavit in support of the judgment creditor's contention in opposition to the garnishee's quest to discharge the garnishee order nisi. The court notes that a hearing similar to the instant one was supposed to take place with regard to a garnishee order nisi involving the same judgment debtor judgment creditor and garnishee in the matter of **Tratsel Supplies Limited v The Attorney General (Ministry of Education) and Reserve Bank of Malawi** Civil Cause No. 1798 of 2001. By the agreement of the parties and the court's direction the arguments advanced by the parties in the present case on the legal points shall apply similarly to that case of **Tratsel supplies Limited v Attorney General** referred to above. The determination of this court in the present matter shall similarly apply to the **Tratsel Case** in so far as the Legal position is concerned on whether the garnishee orders nisi should be made absolute or be discharged as against the Reserve Bank of Malawi. This Court would at the outset like to express its appreciation for the very eloquent submissions of counsel herein and those of the Attorney General.

Mr Latif of counsel for the garnishee contended that garnishee proceedings can not issue in Malawi in respect of the government or the consolidated funds of the Government.

In his submission Mr Latif stated that his submission is derived from paragraph 49/1/2 of O. 49 r1 Rules of Supreme Court as read together with S. 10 of the Civil Procedure (suits by or against government or public officers) (hereinafter referred to as the civil procedure Act) and O. 77 r 15 Rules of Supreme Court and the judgment of Justice Tembo (as he then was) in the case of **National Bank of Malawi v Banda t/a Victoria Distributors and The Attorney General (as Garnishee)** Civil cause Number 325 of 1991.

Mr Latif stated that the law was settled in the High Court decision in the ***National Bank of Malawi Case*** referred to above in 1995 when the High Court held that O. 49 R S C generally does not apply in respect of any order against government. In that case the High Court stated that O.49/1/29 R S C clearly and expressly provides that no order for attachment of debts shall have any effect in respect of any money due or accruing from the crown. Mr Latif submitted that that decision of the High Court stands and binds this court.

The Attorney General in his address adopted the submissions of Mr Latif outlined above. Miss Phoya argued on similar lines to those of Mr Latif and stated that the accounts attached herein are those within the consolidated fund of the government within the Reserve Bank of Malawi. And that by virtue of S. 174 (1) (c) of the Malawi constitution all judgments against government are a charge on the consolidated fund and that as much as the judgment herein constitutes a charge on the consolidated fund the same can not be executed by way of Garnishee proceedings by virtue of O 49 r1 RSC as read with O 77 rr 15 and 16 R S C. Miss Phoya submitted further that the position as advanced by her should for future reference also cover government funds held in other banks other than the Reserve Bank of Malawi.

In his response to the above submissions, Mr Mbendera for the judgment creditor contended that the position advanced above is the one that obtains in England and not here in Malawi. Mr Mbendera argued that given the substantive law under both the common law and crown proceedings Act and the general body of law and policy in England no process of execution lies against the crown.

He submitted that S. 25(4) of the Crown Proceedings Act preserves the immunity of the crown in England from the process of execution or mode of enforcement of orders and judgments against the crown by providing that no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the crown of any money or costs. But that once a certificate is served the proper government department shall pay any amount appearing on the certificate issued by a court for payment by the crown. Mr

Mbendera went on to state that on account of these traditions and conventions execution is rendered totally unnecessary in England. And that this explains why under O 45 r. 1 R S C the rules of procedure expressly state at practice note 45/1/1 that orders 45 to 52 R S C do not apply against the crown. And that the same language is repeated in O. 77 r. 15 R S C. Mr Mbendera though argued that the crown proceedings Act does not apply to Malawi. He went on to submit that O.77 RSC is a procedure to reinforce the crown proceedings Act, 1947. And that Malawi has the civil Procedure Act which combines both substantive and procedural rules with regard to suits by or against our government. And that in terms of S. 8 of the civil procedure Act execution shall not issue on any degree unless it remains unsatisfied for a period of 3 months, making the position on execution against government in Malawi radically different from that obtaining in relation to the Crown in England. The court agrees on that submission that execution can issue against the government if the decree against the government remains unsatisfied for a period of more than three months computed from the date a report is made by the court on a case for the orders of government. But the court hastens to join Mr Mbendera on his observation on how difficult it is for a sheriff officer, who is a public officer, to execute on the government.

Mr Mbendera also then argued that O. 77 R S C does not apply in Malawi. And that since the limitation on garnishee proceedings with respect to government monies in O 49 r 1 R S C arises from the substantive law applicable solely in England, and the procedural law in O. 77 r 15 R S C this Court must read O. 49 R S C in the light of our civil procedure law and as though all the restrictions on garnishee proceedings against government in O. 49 R S C were not there.

In support of the above position Mr Mbendera cited S. 29 of the Courts Act which provides that the practice and procedure of the High Court shall be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court provided that if any provision of the Rules of the Supreme Court is inconsistent with any provision of any rules of the

court the latter shall prevail and the Rules of the Supreme Court shall, to the extent of such inconsistency, be void.

Mr Mbendera then went on to strongly contend that O. 77 R S C which is entitled `proceedings by and against the crown` has no application in Malawi for 2 reasons. Firstly, because the order is caught by S. 29 (b) courts Act because the procedure under O. 77 R S C refers or is solely based on the crown proceedings Act, 1947 that 1947 Act itself not having application in Malawi it not being a statute of general application in Malawi before 11<sup>th</sup> August, 1902. Secondly, that as Malawi has its own civil procedure Act, which has made provision in an identical area, S. 29 (c) of the Courts Act applies and our procedural rules contained in the civil procedure Act prevail over the provisions of O. 77 R S C. Mr Mbendera then stated that our Supreme Court has consistently decided in favour of local rules in comparable matter and he cited the cases of **Kam'bwemba v M B C** 8 MLR 359, 362 and **Shanker Exports Ltd v Moor Agencies Ltd.** 10 MLR 400, 402.

This court therefore has to determine whether O. 77 r 15 RSC, on the basis of which O. 49 RSC states that crown funds in England can not be garnisheed, is applicable to Malawi or not. If O. 77 r 15 RSC is in-applicable in Malawi then O 49 RSC is inapplicable here as well in so far as it bars garnishee of funds of the government.

The court is venturing on this investigation having fully and carefully considered the decision of Tembo J. (as he then was) in the **National Bank case** referred to above. After a careful consideration of that High Court decision, this court was left with the impression that the court therein had not directed its mind to the investigation which this Court is about to venture into. This Court shall not go by the decision of the High Court in the **National Bank Case** referred to earlier on but shall exhaust its own inquiry on the issues brought up now which the High Court then did not have an opportunity to address its mind to. Thus this court will investigate whether indeed garnishee proceedings can not be had against our government's funds in terms of the Rules of Procedure in the High Court currently obtaining. This Court notes that in terms of S. 29 (b)

of the Courts Act., as submitted by Mr Mbendera, any rules of supreme court in England that are based on statutes in England that were not of general application before the receiving date for our law of 11<sup>th</sup> August, 1902 are in applicable to Malawi. It is the view of this Court that it is undisputed herein that the crown proceedings of 1947 was enacted well after 1902 and is inapplicable in Malawi. And consequently any Rules of Supreme Court of England made pursuant to the Crown proceedings Act, 1947 are not applicable to Malawi. It is further undisputed, in the firm view of this court, that O. 77 RSC, being an order containing rules based on the Crown proceedings Act, 1947, is inapplicable. And as such all provisions in O. 49 RSC that bar garnishee proceedings with regard to funds accruing to the Crown are inapplicable to Malawi. By saying this the Court agrees with Mr Mbendera's submission that O. 77 RSC and O 49 RSC are inapplicable to our government in so far as they are based on the crown proceedings Act, 1947 and in so far as in that vein they bar garnishee proceedings against funds accruing to our government in the context of our Rules of procedure.

This court also entirely agrees with Mr Mbendera's submission that where local rules of procedure are provided for then the same take precedence over any Rules of Supreme Court in England on the same area. And this position is appropriately demonstrated in the cases cited by counsel for the judgment creditor namely that of **Kam'bwemba v M B C** 8 MLR 359, 362 and **Shanker Exports Ltd v Noor Agencies Ltd** 10 MLR 400,402. And so the Crown proceedings Act 1947 on which O. 77 r 15 R S C is based does not apply again in the face of our civil procedure Act that, as rightly submitted by counsel for the judgment creditor, provides for the procedure in civil suits against our government. To let the two apply simultaneously would, in the view of this court, lead to procedural chaos when it comes to civil suits against the Malawi government.

So, to discover what the procedural law with regard to garnishee proceedings against our government is one has to examine the provisions of the applicable law *viz*, the civil Procedure Act.

Counsel for the Garnishee and the Attorney General strongly submitted that S. 10 of the civil procedure Act prohibits orders of specific performance against the government. The case of **Tembo and Kainja v Attorney General** MSCA Civil Appeal Number 1 of 2003 confirmed the position that an order of specific performance can not issue against the government. And this court does not dispute that position.

The Attorney General then went on to state that the making of a garnishee order absolute is defined in O 49 r 4 RSC in practice note 49/4/11 that the effect thereof is an order for specific performance against the government to pay monies which order can not be made in terms of the Supreme Court decision referred to above which states that no order for specific performance can be made against government.

In reply to the Attorney General's submissions Mr Mbendera submitted that specific performance as referred to in S. 10 of the Civil procedure Act has nothing to do with the enforcement of judgments and that it has a lot to do with enforcement of contracts. He further submitted the reference to payment of money `forthwith` on a garnishee order absolute in O. 49/4/1 is not specific performance but a way of enforcement of judgment. The court considered the positions expressed above and on a perusal of the **National Bank of Malawi Case** referred to above it was left with the impression that no garnishee order absolute can be made against the government as such as was the case therein. As is clear in that case, the National Bank sought to garnishee moneys due from the Attorney General to Mr Banda for the rentals payable by the government to Mr Banda for the flats government was renting from Mr Banda. This Court feels bound by the decision of the High Court in the **National Bank of Malawi Case** referred to above in so far as it holds that in terms of S. 10 of the civil procedure Act no garnishee order can be made respecting government. This court reproduces the operative part of the High Court's decision in the **National Bank of Malawi Case** cited above. In that case Justice Tembo (as he then was) stated the law as follows at page 2 of the judgment:

***"I have looked at the Civil Procedure (suits by or against the government or public officers) Act, (Cap 6:01) of the laws of Malawi if such an order (a garnishee order) were to be made thereunder, I am unable to say that such is the position. To the contrary, S. 10 of that Act expressly provides that no injunction or specific performance can be ordered against the government. Such being the position, it seems to me that until the required legislative intervention shall have been made in that regard, the position ought to be that no garnishee order can be made respecting the government".***

In the circumstances the court is left with no option but to follow that High Court decision. This is so because the High Court's interpretation of S. 10 of the Civil Procedure Act bars garnishee Proceedings with regard to government. And in the mind of this court this involves government funds wherever they are, be it in the Reserve Bank, Commercial Banks or any debtor of the government. The court adopts this position whilst fully appreciating that all judgment debts for which government is liable are a charge on the consolidated fund of the government in terms of S. 174 (1) (c) of the Republic of Malawi constitution. And the court also fully appreciates that every person shall have an effective remedy by a Court of law or tribunal for acts violating the rights and freedoms granted to him by this constitution or any other law. See S. 41 (3) Republic of Malawi constitution. The court appreciates that the plaintiff is entitled to an effective remedy to enforce his economic rights under our constitution but according to the High Court's decision in the **National Bank Case** cited above garnishee proceedings are not open to the plaintiff as one way of having an effective remedy under our civil procedure Act.

In the premises this Court shall not venture into any further discussions on the issues raised by either of the parties herein because in its view the law has been applied and any further discussion shall not lead to a different result.



As such the court discharges the garnishee orders *nisi* in the case of **Tratsel Supplies Limited v The Attorney General (Ministry of Education) and Reserve Bank of Malawi** civil Cause Number 1798 of 2001 and in the case of **Mr T. Chilenje t/a Combinado Pesqueiro De Matengula v The Attorney General (Director of Fisheries – Mpwepwe Boat Yard)** and **Reserve Bank of Malawi** Civil Cause Number 676 of 2001.

For future reference this court further states that no garnishee Proceedings Shall issue against government funds whether they are held in the Reserve bank of Malawi, Commercial Banks or by any debtor of the government of Malawi.

**MADE** in Chambers at Blantyre this 3rd June, 2003.



M A Tembo

**ASSISTANT REGISTRAR OF HIGH COURT AND  
SUPREME COURT OF APPEAL**