

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRARY
CIVIL CAUSE NO. 2309 OF 1995**

BETWEEN:

NORSE INTERNATIONAL LIMITED.....PLAINTIFF

- and -

**GROUP FIVE INTERNATIONAL
LIMITED.....DEFENDANT**

**GROUP FIVE CONSTRUCTION
LIMITEDCLAIMANT**

**CORAM: CHIMASULA PHIRI J
M. R. Mbendera of counsel for the plaintiff
C. Makhambera of counsel for the claimant
S. Ngwata (on behalf of the Sheriff of Malawi)
Mchacha – Court Clerk.**

ORDER

Chimasula Phiri J,

On 17th June 2005, I dismissed the claimant's with costs and undertook to write a formal order on some matters which appear to be common problem for practicing lawyers in Malawi.

On the date of hearing Mr Mbendera indicated that he was ready, so too was the Sheriff. Mr Makhambera indicated that he was not ready because his client, the claimant had not yet drafted an affidavit for counsel to use. I found this situation odd and wondered if counsel was really serious with his obligations as an officer of this court. At some point, I even asked counsel if indeed he was representing the claimant. I would wish to rarely comment on conduct of counsel but I found it strange that counsel left the duty to draft and present an affidavit to his client. I wonder how much legal knowledge that client of Sidhu & Co has to be able to draft a legal document. In a bid to save time, I declined to adjourn the matter any further and ordered to proceed with the hearing as scheduled.

Background Facts

These proceedings concern a claim lodged by the claimant Group Five Construction Limited, to property seized by the Sheriff in purported execution of a warrant issued against the defendant, Group Five International Limited. The claim was issued by M/S Sidhu & Company, legal practitioners for the claimant on 16th December, 2004. Thereupon, an inter pleader summons was taken out by the Sheriff. Under Order 17 rule 1 of the Rules of the Supreme Court 1999 it is provided that ***“where a person is under a liability in respect of a debt or in respect of any money, goods or chattels and he is or expects to be sued for or in respect of that debt or money or those goods or chattels by two or more persons making adverse claims thereto or claim is made to any money, goods or chattels, by a person other than the person against whom the process is issued the person under liability as mentioned above or subject to rule (2), the Sheriff, may apply to the Court for relief by way of inter pleader. Rule (2) provides, that references in this Order to a Sheriff shall be construed as including references to any officer charged with the execution of process by or under the authority of the High Court.”***

The inter pleader summons was in the usual form. It required the claimant to make an affidavit within 14 days of service of inter pleader summons, specifying any goods and chattels and setting out the grounds upon which such claim is based. Goods or chattels is defined in note 17/1/4 as follows – ***“chattels is one of the widest words known to the law in its relation to personal property – per Fry LJ in Robinson v Jenkins (1890) 24 QBD 275 at 279”***. Liability in

respect of any goods or chattels includes a claim by a claimant to a mere lien over a right to possession of goods – **Jennings v Mather** [1902] 1 KB 1 Ca. The claim must be actual and not merely anticipated – **Isaac v Spilsbury** (1833) 2 Dowl 211; **Bentley v Hook** (1834) 2 Dowl 339. A claim to a lien or right of possession over the goods, and not to the absolute property, is within these words – **Ford v Baynton** (1832) 1 Dowl 357. For example a claim by the hirer under a hiring or hire-purchase agreement. There must have been either an actual seizure or an intention of the Sheriff to seize – **Day v Carr** (1852) 7 Ex 883. The fact that the goods are seized in the possession of the claimant or a third person and not in that of the judgment debtor does not, of course, affect the Sheriff's right to interplead- **Allen v Gibbon** (1833) 2 Dowl 292. If the Sheriff, after seizure, has withdrawn from possession or delivered up the goods seized to the claimant or sold them and paid the proceeds to the execution creditor, the court will not grant him relief. Equitable claims and rights can be entertained and a *cestui que trust* may claim, although the legal owner is the more appropriate party – **Duncan v Cashin** (1875) L.R 10. Under Order 17 rule 2 any person making a claim to or in respect of any money, goods or chattels taken or intended to be taken in execution under process of the court or to the proceeds or value of any such goods or chattels, must give notice of his claim to the Sheriff charged with the execution of the process and must include in his notice a statement of his address and that address shall be his address for service.

On receipt of a claim made under this rule, the Sheriff must forthwith give notice thereof to the execution creditor and the execution creditor must within 7 days after receiving the notice, give notice to the Sheriff informing him whether he admits or disputes the claim. An execution creditor who gives notice in accordance with this provision admitting a claim shall only be liable to the Sheriff for any fees and expenses incurred by the Sheriff before receipt of that notice. Where the Sheriff receives a notice from an execution creditor disputing a claim or execution creditor fails within 7 days to give the required notice and the claim made under this rule is not withdrawn, the Sheriff may apply to the court for relief under this Order. A Sheriff who receives a notice from an execution creditor admitting a claim made under this rule shall withdraw from possession of the money, goods or chattels claimed and may apply to the court for relief e.g an order restraining the bringing of an action against him for or in respect of his having taken possession of that money or those goods or chattels. The inter pleader summons taken out by the

Sheriff was in the usual form. Under Order 17 Rule 3 (6) it is provided that where **“any person who makes a claim under rule 2 and who is served with a summons under this rule shall within 14 days serve on the execution creditor and the Sheriff an affidavit specifying any money and describing any goods and chattels claimed and setting out the grounds upon which such claim is based”**.

No affidavit has been made by the claimant’s officers or directors. Instead an affidavit has been sworn by Mr Makhamberra, counsel for the claimant. The affidavit is quoted in this order in full.

Affidavit in Support

I, CHRIS MAKHAMBERA, a legal practitioner in the firm of Messrs Sidhu and Company, Legal Practitioners of P. O. Box 5162, Limbe make oath and state as follows –

1. *That M/S Sidhu and Company have the conduct of this matter on behalf of the claimant in this action. I am personally seized of the matter and I am authorised to swear this affidavit.*
2. *That the information deponed herein has been given to me by Mr Alvin Naidoo, the Financial Director of Group Five International who is based in the Republic of South Africa and Mr P. R. Dalton of Murray Roberts/Group 5 Joint Venture and I believe the same to be true. Group Five Construction is part of this venture and they use the same address.*
3. *That the defendant company is totally different from Group Five Construction Limited.*
4. *That Group Five Construction Limited was incorporated as Company Registration No. 5057 on 2nd July 1998. Exhibited hereto is Certificate of Incorporation marked “CM” and statement of incorporation marked “CM1” and particulars of first secretary marked and exhibited as “CM2”.*

5. That this matter was commenced by writ in 1995 under civil number 2309 of 1995 against Group Five International Limited.
6. That this was way before Group Five Construction Limited was incorporated.
7. That simple logic will show that the claimant could not owe anything before its incorporation.
8. That on 15th December 2004, a temporary stay was obtained by the defendants. The stay is for 14 days. I exhibit the Order marked “CM3”.
9. That the goods seized belong to the claimant who has urgent ongoing work in Monkey Bay and Golomoti.
10. That the claimant has noting to do with this action. But it has had to come in because of its assets, which comprise various vehicles used in its operation, which are vital for the claimant operations, which were wrongly seized by the Sheriff. The seized vehicles are:
 - (a) 3 Toyota Hilux Pick Ups (BM 8306; BM 9641; SA 4712).
 - (b) 2 Mercedes Benz Water Bowsers (BM 9150; BM 9139).
11. That I sought from Group Five Construction Limited documents with regard to the vehicles and the following documents were released which I hereto attach and exhibit marked “CM4”, “CM5”, “CM6”, “CM7” and “CM8”.
12. That as will be noticed “CM4” to “CM7” are clearly the property of Group Five Construction, the claimant herein and “CM8” belongs to Murray and Roberts who were at the time in a joint venture arrangement with the claimants but have

since been bought off by the claimants. Exhibited hereto is a letterhead of Murray and Roberts/Group Five Joint Venture marked "CM9".

13. That it is clear from the exhibited documents and the averments herein that the defendant does not own the seized vehicles.
14. That I am further informed which I believe to be true that the vehicles were not willingly surrendered by the claimant rather the Sheriff insisted on getting some things of good value and the vehicles seized are relatively new, all of them having been registered with MRA in 2004.

WHEREFORE I pray that the goods seized be released forthwith and that Sheriff fees and expenses be provided for in line with the law.

There is an affidavit in opposition sworn by Mr Rainer Franzel who is the Managing Director of the plaintiff/execution creditor. The affidavit is also quoted in full.

1. That I have read what purports to be the affidavit of Mr Chris Makhambera filed in these inter pleader proceedings.
2. That the defendant in these proceedings is Group Five International Limited with whom my company contracted way back in the 90s when they had operations in Malawi. There is now produced and shown to me a true copy of a letter written by a Mr Hannes Van de Venter who in 1995 was a Site Agent of the defendant company exhibited hereto and marked "F1".
3. That I respectfully draw attention to the following material issues:-
 - (i) As per exhibit F1, Group Five International Limited was in 1995 registered in England and Wales as company number 1855441.

- (ii) *It maintained offices at 373 Rivonia Boulevard, Rivonia Sandton in the Republic of South Africa.*
 - (iii) *It also maintained offices in Malawi.*
- 4. *That this same company at some point changed its name to become Group Five Construction (UK) Limited as appears by document exhibited hereto and marked “F2”.*
- 5. *That with regards to Exhibit F2, I draw attention to the following matters which are apparent on the documents themselves:-*
 - (i) *The document indicates that Group Five Construction (UK) Limited is a company incorporated in England and Wales as company number 1855441.*
 - (ii) *That it was received by Malawi Revenue Authority Legal Department on September 30th,2004.*
 - (iii) *That it maintains a presence in Malawi.*
 - (iv) *That all the vehicles that are set out in the compendium are registered in the name of Group Five Construction (UK) Limited.*
- 6. *That in my respectful submission, Group Five International Limited as per Exhibit F1 is the same company that became known as group Five Construction (UK) Limited as per Exhibit F2.*
- 7. *That Group Five Construction (UK) Limited, or as previously known Group Five International Limited is the one that owns the properties seized in Malawi at Golomoti.*

8. *That Group Five Construction (UK) Limited referred to by Mr Makhambera in paragraph 4 of his affidavit is indeed a different company. It was registered in Malawi as company 5057. But this is not the company that owns the vehicles that were seized.*
9. *That the premises from which the seizure took place do not belong to Group Five Construction (Malawian company number 5057). The premises belong to the joint venture operations between Murray & Roberts and Group Five.*
10. *That the joint venture operations maintain a contract site office at P. O. Box 40643, Kanengo, Lilongwe 4 in the Republic of Malawi as appears by Exhibit CM9 to the affidavit of Mr Makhambera.*
11. *That whilst Mr Makhambera suggests in paragraph 12 of his affidavit that the claimants, that is to say Group Five Construction Limited/Malawi Company Number 5057, is the one in joint venture with Murray & Roberts he is clearly mistaken in this view.*
12. *That contrary to what Mr Makhambera alleges in his affidavit, the partner of Murray & Roberts in the joint venture is Group Five Limited of 371 Rivonia Boulevard, Rivonia, 2128 South Africa. This is clear from the tender document which was issued by the joint venture to the National Roads Authority as per document signed at Johannesburg, South Africa on 22nd March 2002. The said document is exhibited thereto and marked "F3".*
13. *That according to the South African Federation of Civil Engineering Contractors, this company has been registered with the Federation since 1968.*
14. *That it appears to me Group Five International Limited (company number 1855441), Group Five Construction (UK) Limited (company number 1855441)*

and Group Five Limited of 371 Rivonia Boulevard, Rivonia, 2128 South Africa are one and the same company and that any carination attempt is mere ruse.

15. *That accordingly whatever the connection, the claimants are not the company referred to by the South African Federation of Civil Engineering Contractors. There is now produced and shown to me a certificate issued by the South African Federation of Civil Engineering Contractors exhibited hereto and marked "F4".*
16. *That the joint venture pre-bidding agreement for the construction of the M1 Golomoti – Monkey Bay road is covered by a document a true copy whereof is exhibited hereto and marked "F5".*
17. *That it is significant that Group Five International Limited is also at 371 Rivonia Boulevard, Rivonia, 2128 South Africa as papers by letter dated 8th December 2004 issued by Sacraine, Gow & Company exhibited hereto and marked "F6".*
18. *That I draw attention to the following material facts*
 - (i) *The pre-bidding agreement indicates Group Five Limited of 371 Rivonia Boulevard, Rivonia, 2128 South Africa as the partner and not Group Five Construction/Malawi company number 5057 referred to by Mr Makhambera.*
 - (ii) *The document identifies the M1 Golomoti – Monkey Bay road as the project for which they were entering into the joint venture.*
 - (iii) *The Group Five Company identified is certainly at the same place as Group Five Construction (UK) Limited or Group Five International which are both registered company number 1855441.*

19. *That accordingly the claim that Mr Makhamberra makes in paragraph 12 that the claimant was a joint venture partner in Murray & Roberts is a mistake.*
20. *That I am advised and verily believe that the fact that documents exhibited number CM4 to CM8 indicate the Malawi Revenue Authority as the title holder means that the duty on these vehicles has not been paid and that the registration is in favour of a party that has come into the country for a duty free contract.*
21. *That in my experience as a civil engineer in Malawi, that benefit would not be given to Group Five Construction/Malawi company number 5057.*
22. *That the very fact that the registration is held by the Malawi Revenue Authority indicates to me that the Malawi Company has no title to these vehicles. Group Five Construction referred to therein must be company number 1855441 and not the local company number 5057.*

On the material before this court, the plaintiff/execution creditor raised the following issues –

Firstly, that Mr Makhamberra's affidavit is inadmissible, and that it is hearsay evidence in all material respects. The plaintiff relies on Order 41 Rule 5(1) which reads as follows –

*“Subject to Order 14 rule 2 (2) and 4 (2); Order 86 rule 2 (1) and 4 (1A); Order 88 rule 5 (2A); Order 113 rule 2; Order made by court under Order 38 rule 3 and Order 41 rule 2 **an affidavit may contain only such facts as the deponent is able of his own knowledge to prove**”.*

Its effect is to require that save in the excepted cases, an affidavit must contain the evidence of the deponent as to such facts only as he is able to speak to of his own knowledge, and to this extent, equating affidavit evidence to oral evidence given in court. The only exception under Order 41 rule 5(2) is in respect of an affidavit sworn in interlocutory proceedings. I will deal with this aspect later in this order. For now it must be stated in clear terms that affidavits for

inter pleader proceedings under Order 17 are not included in the excepted cases. Therefore, I have no doubt in my mind that counsel Makhambera is not an officer or director of the claimant company. It is clear that his affidavit is based on information given to him by another i.e. hearsay evidence. Since counsel has no personal knowledge to prove the matters from his personal knowledge of existing facts, his affidavit is contrary to Order 41 rule 5(1) and is inadmissible. The exception would have been to allow counsel use such an affidavit in interlocutory proceedings.

Order 41 rule 5 (2) states that an affidavit sworn for the purposes of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

However, my strong objection as a matter of practice is that counsel should desist swearing an affidavit on behalf of clients even in interlocutory proceedings. If a client is able to consult and brief a lawyer why should it be difficult for that client to swear an affidavit prepared by counsel based on the brief and instructions? Unless where the client cannot easily be contacted, my strong view is that counsel should desist the temptation of making it as a matter of course to swear affidavits on behalf of clients. I do not wish to see counsel being put to task in cross-examination by the other party in the event of inaccurate contents of counsel's affidavit based on erroneous information supplied by client to own lawyer. In this Order, I am decrying the increasing bad practice of lawyers swearing affidavits on behalf of their clients. It is a better evil to delay by a day or two than face an embarrassing cross-examination because your client was not upright or had a mistaken belief. I urge all lawyers in Malawi to hear my cry and make amends.

Secondly, the plaintiff/execution creditor has raised the argument that inter pleader proceedings are not interlocutory because a decision in those proceedings decided the rights of the parties. Order 41 rule 5 and Practice Note 41/5/3 put the matter to rest when it defined what is considered interlocutory for purposes of Order 41 rule 5 in the following terms –

*“Proceedings are not interlocutory proceedings within this rule merely because they are seeking an interlocutory order and not a final order. A distinction is drawn between interlocutory proceedings generally and interlocutory proceedings where an issue has to be determined, the latter class falling outside this rule. For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, or as to what is to be done in the progress of the cause of the purpose of enabling the court ultimately to decide upon the rights of the parties – **Gilbert v Endean** (1878) 9 ChD 259 at p269. This was applied in **Rosage v Rosage** (1960) 1 ALL ER 603. This court agrees with Mr Mbendera that inter pleader proceedings are not interlocutory proceedings. Therefore the affidavit of Mr Makhambera is misplaced.*

The court has been moved in the submissions of Mr Mbendera to expunge Mr Makhambera’s affidavit from the record and that it should not be regarded as evidence at all. I have no good reason to reject this prayer. In the first instance, the affidavit of Mr Makhambera as earlier held was neither by a person having personal knowledge of the matters nor an officer or director of the claimant. It is thus, inadmissible evidence.

Secondly, the affidavit cannot be excepted because the inter pleader proceedings were not interlocutory so as to bring the affidavit within the ambit contemplated under Order 41 Rule 5 (2). Therefore, the affidavit of Mr Makhambera is expunged from the record. The result is that the claimant has not put an affidavit within 14 days in support of the notice of claim made to the Sheriff. It was held in **Alimahomed and Another v Kulinji** MSCA civil appeal number 10 of 1987 that the reading of Order 17 rule 3 clearly shows that an affidavit by a claimant is a must. As will be noted from sub-rule (6) above, the claimant shall within 14 days serve on the execution creditor and the Sheriff an affidavit specifying his claim, and the grounds upon which he is doing so. It was the view of that court that this defect could not be cured by Order 2 rule 1 of the Rules of the Supreme Court which deals with curable irregularity. I subscribe to the views of the Malawi Supreme Court of Appeal in that judgment.

At this juncture, I should have straight away dismissed the claimant's claim with costs because there is no issue for adjudication of title between the plaintiff and the claimant. The affidavit of Mr Rainer Franzel is the only material in the court. It is important to note that in that affidavit it has been shown that Group Five International Limited (the defendant) is the same as Group Five Construction (UK) Limited which has assets in Malawi. The presumption of registration of motor vehicles by the claimant as owner can be rebutted by evidence *inter alia* that both the claimant and defendant use the same colourated names. Further, a local company would not register ownership with title reserved to the Malawi Revenue Authority. These would be pointers that the registration of these vehicles was intended to be for the defendant and not the claimant which is a locally registered company. The claimant has not produced any *other* relevant evidence in support of title for these vehicles. Documents of importation by the claimant would have been relevant. Documents proving process of payment for those vehicles would have been relevant. There is totally no evidence from the claimant and as earlier indicated the claimant's claim is hereby dismissed. The Sheriff should proceed to advertise and sell the goods and chattels seized in execution.

Costs are in the discretion of the court. Normally costs follow the event. The claimant has been unsuccessful in its claim and is condemned in the costs of these proceedings.

MADE in chambers this 1st day of August 2005 at Blantyre.

Chimasula Phiri

JUDGE