IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL CAUSE NO. 63 OF 2006

BETWEEN

G H BANDAWE [Trading as KAKA MOTEL] PLAINTIFF

-AND-

MZUZU CITY ASSEMBLY IST DEFENDANT

KESALE AUCTIONEERS
& ESTATE AGENTS 2ND DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE L P CHIKOPA
Sibande of Counsel for the Plaintiff
R J Mhone of Counsel for the Defendant s

I Zimba Bondo (Mr), Court Clerk

JUDGMENT

Chikopa J

INTRODUCTORY REMARKS

Sometime in early to mid 2005 the first defendant set about selling properties within Mzuzu City boundaries for non-payment of city rates. It is obvious from the number of suits filed with this Registry that a substantial number of properties and property owners were affected by this exercise each one of whom filed a separate suit in respect of such sale. Due to certain considerations it became clear that all these matters could only be appropriately heard in this court. As time went on it also became clear that this court could not, in all fairness, handle all these matters simultaneously. With a little prodding the parties agreed that all matters of this nature pending in this court against the defendants be stayed until we had dealt with the present one to finality. It was further agreed that the first defendant would meanwhile desist from taking any action of the nature that led to this proceeding until this court pronounced its opinion herein. This judgment must therefore be understood not only in the context of its peculiar facts but also in the context of all suits of a similar nature actually pending before this court and also of all other activities of the defendants of a nature that might lead to suits of the kind now under consideration.

BACKGROUND

The plaintiff is the proprietor of some hospitality place called Kaka Motel. It is clear from the facts that the Motel was one of the properties purportedly sold by the first defendant acting through its duly authorised agent the second defendant. They were apparently acting under powers granted to the first defendant under the Local Government Act [Number 42 of 1998] [the LGA]. The plaintiff thought *inter alia* that the purported sale was not conducted in accordance with the law including the LGA. He on May 4th 2006 brought an action by way or originating summons praying for *inter alia*:

1. *An order of the court that the sale by auction of commercial property known as Plot Number MZ/819/0 where there is Kaka Motel at Luwinga in the City of Mzuzu was illegal, unlawful and therefore invalid;*

2. *An declaration by the court that Kesale Auctioneers and Estate Agents has no mandate to advertise, valuate, sale by auction or act as an estate agent because the said Kesale Auctioneers and Estate Agents is not registered under section 4 of Land Economy Surveyors, Valuers, Estate Agents and Auctioneers Act Cap 53:08 of the Laws of Malawi;*

3. *A determination of the court as to whether Mr G H Bandawe (trading as Kaka Motel) is supposed to pay city rates to Mzuzu City Assembly in the circumstances that where he stays is supposed to be his village and Malawi Government in conjunction with Mzuzu City Assembly has not relocated him away from city boundaries as agreed between Malawi Government, Mzuzu City Assembly and Local Government Leaders of Luwinga Village Community;*

4. *The declaration by the court that all bona fide villagers of Luwinga Village Community should be exempted from issues of city rates until the Malawi Government in conjunction with Mzuzu City Assembly sort out the issue of relocation of villagers around Luwinga Community away from land controlled by the Mzuzu City Assembly;*

5. *A determination by the court as to whether Mzuzu City Assembly can enforce issues of city rates in the absence of Town Councillors.*

Contemporaneous with the originating summons the plaintiff sought, via an *ex parte* summons, an injunction seeking to restrain the defendants from completing the purported sale of Kaka Motel. It was granted provided *inter alia* that an *inter parties* application in respect thereof was heard on May 23rd 2006. At the *inter parties* hearing the defendants not only argued against the extension of the injunctive relief but, casually in our view, also expressed some doubt about the propriety of the mode of commencement of these proceedings.

In our ruling of the same date we extended the injunction. We also, with the consent of both parties, gave directions as to the further conduct of this matter. For the record, evidence would be by way of affidavits with either party at liberty to cross-examine the deponents of such affidavits provided prior notice was given. The matter was set down for hearing from 10 to 12th July 2006. It was not heard. Instead we next met on July 11th 2006 when the defendants verbally, but without prior notice [formal or otherwise] objected to the mode of commencement. In their view this matter ought to have been commenced by way of judicial review. On his part the plaintiff objected to

the hearing of the preliminary objection in the main because there was no formal prior notice from the defendants either of such objection or of its hearing. He was being ambushed he said. Again with the consent of both parties we ordered that the defendants do file a formal notice of the preliminary objection the same to be heard on August 16th 2006. The idea was that in the interim the defendants would see the necessity of filing and serving the requisite papers with the court and on the plaintiff. On August 16th the defendants did not appear. It was also clear that the formal documentation in respect of the preliminary objection had not been served on time. To save time we *inter alia* ordered that the preliminary objection would be heard on September 18th 2006. Further that if the preliminary objection was not successful we would proceed to hear the substantive action. Naturally if the preliminary objection succeeded we would not proceed to hear the substantive issue. We also ordered that costs occasioned by the adjournment of August 16th 2006 be agreed/taxed and paid by the defendants no later than the next date of hearing meaning September 18th 2006.

The defendants must have been dissatisfied. When we met on September 18th they sought leave to appeal to the Supreme Court. It was granted. Their sojourn in that court was not to be a happy one though. They came back to this court and agreed that this matter proceeds to trial as per our order of August 16th. We thus set this matter for hearing on March 29th 2007. Trial actually commenced. Problems however arose when the defendants sought to cross-examine the plaintiff on his affidavit. It was clear that they had not formally previously notified the plaintiff that he would be so

cross-examined. We had no option but to adjourn the matter to 8th and 9th May 2007. In the interim the parties were ordered to give notice of which of each other's witnesses they intended to cross-examine. We could not hear the matter on 8th and 9th May 2007 either. Counsel for the plaintiff was bereaved. We adjourned the matter to 12th and 13th June 2007. On the appointed days Mr Mhone, Counsel for the defendants, did not make an appearance. Neither did his clients. There was also no explanation as to the absences. We had no choice but to adjourn the matter. The costs occasioned by the adjournment were awarded to the plaintiff the same [taxed or agreed] to be met personally by the defendants' counsel before the next date of hearing. Such is our abhorrence of disrespect [actual or apparent] towards the courts.

On July 13th 2007 the court issued a notice of hearing. It was returnable on August 6th and 7th 2007. It was clear from the said notice *inter alia* that this matter would proceed if either party did not, for good reason, attend court on the appointed days. Despite having been served the defendants and their counsel were nowhere to be seen on August 6th 2007. Neither was there some explanation for such absence. We proceeded to complete hearing the matter. Not that much happened. As we have said above the evidence herein was by way of affidavits. The hearing was mainly to facilitate a cross-examination of the witnesses on their affidavits. On this day the plaintiff closed their case and expressed no intention to cross-examine any of the defendants' witnesses. The defendants not being present their case was also deemed closed and the whole matter adjourned for judgment. We in writing informed the

parties hereto that they could, if they so wished, favour us with written arguments the same to be with us before the expiry of 14 working days from the date of the closure of the matter i.e. August 6th 2007.

THE EVIDENCE

Evidence was by affidavits. There were thus affidavits sworn by the plaintiff, Mr Sam Chirwa Chief Executive Officer of the first defendant and Mrs Chiharo Botha Managing Director of the second defendant. We shall refer to the evidence as we discuss the issues raised herein.

THE ISSUES

The plaintiff raised five items in his summons namely the legality of the sale of Kaka Motel, the capacity of the second defendant under the enabling Act to advertise, valuate or sale by auction Kaka Motel or act as an estate agent, whether the plaintiff should pay city rates to the first defendants, whether *bona fide* villagers of Luwinga Village should pay city rates to the first defendants and lastly whether the first defendant has the capacity to enforce issues of city rates in the circumstances of this case.

The defendants on their part questioned the propriety of the mode of commencement of the present proceedings.

The last issue would of course be that of costs. We debate the issues in the order we think appropriate for the proper disposal of this matter.

Propriety of the Mode of Commencement

This is the matter on which the defendants went as far as the Supreme Court. In **Jenala Peter Wandaza Chitete v Mzuzu City Assembly** Civil Cause Number 125 of 2005 [Mzuzu Registry] [unreported] the defendants objected to an action being commenced by way of originating summons on much the same arguments they raise herein. There is not much need to go through the said arguments. It is enough, we think, to say just as we did in the Chitete case that whereas it was possible to commence this matter by way of judicial review it is possible, and therefore not irregular or improper, to have it commenced [like happened herein] by way of originating summons. We see no reason therefore to throw out this matter just because it was not commenced by way of judicial review or because it was commenced by way of originating summons. The preliminary objection is overruled.

If we might, even as *obiter*, say so we think that this preoccupation with legal technicalities will in the long run have unhealthy consequences for our justice delivery system. Nowadays parties tend to use technicalities for purposes of frustrating rather than enhancing the delivery of justice. In the case of **Aaron Longwe**

v Attorney General [1993] 16(1) MLR 257 Justice Tambala [as he then was] said in relation to an objection about the propriety of the mode of commencement:

> *'the application affects a matter of great national importance. It concerns the freedom and the right of an individual to participate in effecting peaceful change in the political system of his country. The decision on such application must, in my view, depend on the substance and merits of the application and not on a procedural technicality'*.

In **Elias Sochera & 5 others v Council of the University of Mzuzu** Civil Cause Number 135 of 2005 [Mzuzu Registry] [unreported] we said at page 2:

> *'it is our view that procedures should not as much as possible be used to prevent parties from bringing their matters before the courts. That in fact they should as much as possible be used to allow parties to better their access to the courts'*.

The above sentiments must hold truer now that we have a constitution that specifically protects rights of the sort in issue herein namely the right to property. Maybe we could learn a thing or two from the way the **Civil Procedure Rules [1999]** in the United Kingdom have been developed. The emphasis is on dealing with cases

justly and expeditiously. They have therefore only one mode of commencement. It has brought to an end endless objections about modes of commencement.

Whether the Second Defendant i.e. Kesale Auctioneers and Estate Agents had the Mandate to Advertise, Valuate, Sale by Auction or Act as Estate Agents in Respect of Kaka Motel

The plaintiff argued that because the second defendant is not registered under the enabling Act as an estate agent, valuer or auctioneer it had no mandate to advertise, valuate, sale by auction or act as an estate agent in respect of Kaka Motel.

The defendants while not disputing that the second defendant was not so registered have a contrary opinion. In their view the enabling Act only proscribes, in the absence of a registration, the use of the words land economy, valuer, estate agent, or auctioneer for purposes of gain. It does not prevent one from working as an auctioneer, estate agent, valuer, surveyor, land economist. In their words **'the illegality is in the use of the above words and not in the work one does'**. The lack of a registration under the enabling Act cannot therefore have the effect of denying the second defendant a mandate to advertise for sale, sale by auction, valuate, or act as an estate agent in respect of Kaka Motel. Secondly the defendants argued that the second defendant acted at all material times under the supervision of a duly registered valuer, auctioneer and estate agent namely Lipimbi Property Services; that the capacity of the second defendant to sale by auction, advertise, valuate etc Kaka Motel

cannot now be challenged on the ground that the said defendant was not duly registered. Thirdly the defendants argued that the second defendant's services are well recognised nationally as evidenced by the fact that various institutions had granted them contracts as auctioneers and valuers. Their capacity to sale by auction, valuate or act as estate agent cannot therefore be called into question. Fourthly they contended that the Act itself did not specify what sanction was to be applied in the case of a person acting without a registration under the enabling Act. As such it can not be concluded that any purported advertisement, valuation, sale by auction etc of Kaka Motel by the second defendant would be a nullity due to a lack of registration. Fifthly the defendant reminded us that the seizure and sale of Kaka Motel was ordered by the High Court in **Mzuzu City Assembly v A N Phiri** Civil Cause Number 2012 of 2005 [Principal Registry] [unreported] by an order dated October 19th 2005. All the second defendant as an officer of the court, namely a bailiff, did was to execute such order by selling by auction Kaka Motel. They cannot now be accused of acting without lawful mandate.

We think the issues surrounding the capacity of the second defendant to advertise, valuate and sale by public auction Kaka Motel must be considered in their factual, legal and organisational context if they are to be satisfactorily resolved. Accordingly it is a fact that Kesale Auctioneers and Estate Agents are not registered under the enabling Act to carry on the business of auctioneers, valuers, land economists or

estate agents. This is clear from the affidavits of Chiharo Botha the second defendant's Managing Director. Secondly, it is also clear that Chiharo Botha did not tell the exact truth when she deponed that the second defendant was supervised by Lipimbi Property Services in whatever they did in connection with the purported sale of Kaka Motel. We are aware that there is a copy of a contract allegedly entered into between the second defendant and Lipimbi Property Services dated December 15th 2003 and exhibited as CB2 to Chiharo Botha's affidavit of July 4th 2006. We are also aware of exhibits CB10A, CB10B, CB10C and CB10D in Chiharo Botha's affidavit of March 20th 2007. They are all meant to show that the second defendant's work was generally referred to Lipimbi Property Services for supervision.

If we may say so the totality of the said exhibits does not show that the second defendant's purported sale by auction, valuation and advertisement of Kaka Motel was supervised by Lipimbi Property Services. Neither does it show that any of the second defendant's work was ever referred to Lipimbi Property Services for supervision. CB10A, an invoice from Lipimbi Property Services, shows that Lipimbi Property Services had done work for a Mr MHC Botha for which they were demanding payment. Similarly the attachments to exhibit CB10A do not show that the second defendant generally referred their work or the purported sale by auction, advertisement or valuation of Kaka Motel to Lipimbi Property Services for supervision. In point of fact CB10A and its attachments are letters from the abovementioned Mr MHC Botha authorising the second defendant to valuate and

subsequently sale his house. If one can bring in Lipimbi Property Services into this scenario it is to the effect that the second defendant realising that they had no capacity to valuate Mr MHC Botha's house engaged the services of Lipimbi Property Services to carry out the valuation. Not to supervise any prior valuation. The invoice is thus a request from Lipimbi for payment for services rendered. We must say we fail to appreciate how the defendants concluded from CB10A and its attachments that Lipimbi Property Services generally supervised the auctioneering activities of the second defendant and of the sale of Kaka Motel in particular.

Much the same can be said about exhibits CB10B, C, and D. B is an invoice to the second defendants for valuation services rendered. It says nothing about Lipimbi supervising the second defendant's work. C is a request from Gordon Memorial Hospital to the second defendant asking them to value, for rental purposes, certain residential properties. The attachment thereto is an invoice from Lipimbi Property Services to the second defendants for valuation reports, not supervisory services, in respect it seems of the same residential properties. Again we fail to see how these documents can be read to mean that Lipimbi Property Services generally supervised the second defendant's work when it is clear that the invoice was in relation to valuation services rendered by Lipimbi Property Services to the second defendant. Services rendered by Lipimbi obviously because the second defendant had no capacity. D is an instruction from the Registered Trustees of the Association of Jehovah Witnesses of Malawi to the second defendants to sale certain houses at

Mzimba. Paragraph two thereof makes mention of the fact that the houses had previously been valued by Lipimbi Property Services. It does not say, much less suggest that the second defendants also valued them under the supervision of Lipimbi Property Services. But more than all the above is the letter dated July 7th 2006 exhibited as GHBS12 to the plaintiff's affidavit. The contents are not in the least complimentary of the second defendant as an auctioneer or estate agent. But that is not our business. Suffice it to say for purposes of this case that whereas there is serious doubt as to whether Lipimbi Property Services have ever supervised any of the second defendant's *inter alia* auctioneering and valuation services it is clear even from a cursory reading of exhibit GHBS12 that Lipimbi never supervised the purported sale of Kaka Motel. It is interesting to note that Chiharo Botha has since exhibit GHBS12 came on the scene sworn two more affidavits. In neither did she find it necessary to dispute the contents of exhibit GBHS12. It must be because such contents are actually true.

Thirdly and as a matter of both fact and law it is not true that the second defendant is an officer of the court to wit a bailiff. It is obvious from Exhibit CB6, an identity card, and Exhibit CB12 a letter from the Sheriff of Malawi dated April 22nd 1997 that it is Dick Solister Botha and not the second defendant that was appointed Bailiff of the High Court of Malawi. Dick Solister Botha is sadly deceased. He ceased being a bailiff on his death. He could never have and did not pass on his being a bailiff to the second defendant. The reference in Chiharo Botha's affidavit of March 20th 2007 to

an Officer of the Court cannot and must not be read to mean the second defendant but rather to the late Dick Solister Botha. It is on the basis of the foregoing that we think it an inexactitude to refer to the second defendant as an officer of the court.

Fourthly, it appears to us that whereas it cannot be denied that the first defendant obtained an order of the High Court allowing them to **'seize and sell by public auction in satisfaction of the rates due'** some properties such seizure and sale had to proceed in a lawful fashion. The court order, in other words, was not to be taken as a sanction for the first defendant to proceed to seize and sell *inter alia* Kaka Motel in any manner it wanted without due regard to the law. In fact the underlying assumption was at all times to be that both the **seizure** and **sale by public auction** of Kaka Motel would be done in accordance with the relevant laws.

Fifthly and regarding the fact that the second defendant had been used by various institutions as auctioneers and valuers the general principle in our view is that the second defendant's act[s] become lawful not because they have been done many times over but because they are sanctioned by some legal instrument. We would think therefore that the fact that the second defendant had been hired by others to valuate or auction property did not of itself make such acts lawful.

Most of the general concerns surrounding the second defendant's capacity to advertise for sale, valuate or auction Kaka Motel having disposed of the debate now moves on to what we think is the main matter for consideration in this part of our opinion

namely the effect of a lack of registration under the enabling Act. Is it that when one is not registered under the enabling Act they cannot advertise, sale by auction or valuate any property? That they cannot act as an estate agent? The starting point has to be the relevant legislation which we quote in full:

Section 3(1)

> 1. *After the expiration of six months from the date of coming into operation of this Act, no person shall practice under any name, title, or style containing the words land economy, valuer, estate agent, or auctioneer or for purposes of again make any other use of such name, name title, style unless he is registered under this Act as a land economy surveyor, valuer, estate agent or auctioneer;*
> 2. *Any person who contravenes subsection (1) shall be guilty of an offence.'*

Section 8(1) (a)

> *'no person shall after the expiration of the period of 6 months from the date of the coming into operation of this Act be registered as a Land Economy Surveyor, valuer, estate agent or auctioneers unless he shall at the date of his application for registration have attained the age of 22 years and paid the prescribed registration fee and either;*
>
> *(a) shall have passed the qualifying examination approved by the Board and shall have had not less than 2 years post qualification practical experience or articled pupilage in the work of a Land Economy, Valuer, Estate Agent or Auctioneers to the satisfaction of the Board'.*

If we may reiterate the defendants' argument it is that the enabling Act does not prohibit one from doing the work of an estate agent, valuer, auctioneer etc if they are not registered under the enabling Act. Rather what it prohibits is the use of the titles valuer, estate agent, auctioneer etc. Anybody whether registered or not can, in their

view, carry out the work of an estate agent, auctioneer, valuer without having to be registered. They do not in so doing beak the law. They only do so when they do that work under a name, title, or style containing the words valuer, estate agent, or auctioneer. Meaning in the context of this case that the second defendant could have lawfully advertised, valuated and sold by auction [the normal functions of an estate agent, valuer or auctioneer] Kaka Motel notwithstanding the fact that they were not registered under the enabling Act. As long as of course they did not do that under any name, title or style containing the words valuer, estate agent or auctioneer.

As we understand the enabling Act's purport it is to regulate the conduct of estate agents, valuers, land economists, auctioneers etc. It is also to provide for their registration. This, we must hasten to say, is not an exhaustive list of the said Act's objectives. But if we may cast the above in simpler language we think that the enabling Act's main objective is to let the public know who can not only title or style themselves as estate agents, land economists, auctioneers, valuers etc but also those who can lawfully perform the duties and functions of persons so titled. By necessary implication we think the enabling Act also allows the public to know who should not be so titled and who should not by law be allowed to carry out the functions and duties of auctioneers, valuers, estate agents, land economists, surveyors etc. We find it a tad simplistic therefore to think that the enabling Act's sole objective is to prohibit the use of the titles valuer, estate agent, land economist or auctioneer by those not

registered under the enabling Act. In our view it also prohibits people from **lawfully** holding themselves out as valuers, auctioneers, estate agents and land economists unless they are registered with the Board. And because you cannot lawfully hold yourself out as such unless you are registered you can also not lawfully do that which valuers, estate agents, land economists and auctioneers do unless you are registered. The enabling Act therefore prohibits not just the use of the above titles but also the lawful carrying out of that which is associated with such titles unless you are registered under the enabling Act. If we may thus put the defendants' arguments in context we do agree that one, if they so wished, may carry on the work of a valuer, surveyor, auctioneer, estate agent or land economist even if they are not duly registered. Just that they will be doing it unlawfully which is exactly what the enabling Act set out to prohibit. So that when the defendants argue that the second defendant could valuate, advertise for sale, sale by public auction Kaka Motel the absence of a registration notwithstanding they should be understood to be saying that they would be doing so illegally which, as we say above, is that which the enabling Act proscribes.

For purposes only of emphasis we go back to the defendants' argument that the second defendant had acted as auctioneers, valuers, and estate agents for so long and in relation to so many transactions their capacity in those respects should really be above question in the instant case. With the greatest respect that is taking a rather pedestrian view of the events herein. Like we have said above an act does not

become lawful because people have done it many times over. If such were the case murder would have long become legal looking at the frequency with which it is committed the world over. Rather an act becomes lawful because it is actually lawful. It is that which the law permits. In the instant case it matters not in our judgment that various persons or institutions have used the services of the second defendant. There will always be people who for one reason or another prefer to proceed unlawfully or in disregard of lawful procedures. That is their unfortunate choice and one always hopes they shall at an appropriate time be able to face the consequences of their such choice. But that cannot make that which they do unlawfully lawful. It remains unlawful. The second defendant can not therefore be allowed to legalise their illegal conduct by trotting out further illegalities. The fact of the matter is that a lack of registration under the enabling Act prohibits not only the use of the job titles thereunder but also the lawful carrying out of the duties connected therewith. The second defendant did not therefore in respect of Kaka Motel have had the mandate to advertise, valuate, sale by auction or act as estate agent.

Whether the Sale by auction of the Commercial Property Known as Plot Number MZ/819/0 i.e. Kaka Motel was illegal, unlawful and therefore invalid

Going through the parties' arguments it is clear to our mind that the purported sale of Kaka Motel proceeded on the basis firstly of the court order in **Mzuzu City Assembly**

v A N Phiri & Others above-mentioned and secondly on the provisions of section 91 of the LGA which we quote in full.

Section 91

(1) In addition to any remedy provided under Part VI relating to the recovery of debt, if any, if any sum due for any rate levied on any assessable property remains unpaid for a period of three years after the date upon which such sum became payable the Assembly shall publish a notice in the Gazette and a newspaper circulating within the local government area showing the name and address of the owner, the description of the property, the amount of the rates outstanding, requiring the owner to pay the arrears within thirty days of the date of the publication of the notice;

(2) If the arrears are not paid within the period stated in subsection (1) after notice to any mortgagee, the property shall be seized by the Assembly through a court of law and thereafter sold by public auction in satisfaction of the rate due;

(3) The Assembly shall give notice of the sale by advertisement in the Gazette and a newspaper circulating within the local government area;

(4) The owner may recover possession of the property by paying in full all arrears and expenses incurred by the Assembly at any time before the sale;

(5) In the event of sale the Assembly shall retain out of the proceeds the amount of arrears and surcharge and the costs of sale which shall have priority over any other registered or unregistered interest in the property and shall be charged as trustee to those who may be entitled to the balance, if any, of the proceeds of the sale;

.

(6) A sale of a property under the provisions of this section shall pass a good and sufficient title;

(7) Nothing in this section shall prevent the Assembly from taking proceedings for recovery by ordinary action in the court;

(8) No liability for error or irregularity shall attach to the Assembly or to any employee of the Assembly arising from the exercise by the Assembly of powers granted under this section'.

Before therefore an Assembly can be taken to have complied with section 91 abovementioned in the sale of property to recover arrears of rates it must have done the following:

i. The rates must have been outstanding for at least three years from the date on which they fell due;

ii. The Assembly must publish a notice in the Gazette or a newspaper of local circulation indicating the name and address of the property owner, the sum owing in respect of rates and a description of the property requiring the said owner to pay the arrears within thirty days from the date of publication of the notice;

iii. If the rates remain unpaid after the expiry of the said notice the Assembly shall seize the property by court order for purposes of sale by auction to recover any rates outstanding;

iv. The Assembly shall give notice of such sale in the Gazette or local newspaper.

v. If the arrears remain unpaid even after such notice the Assembly would then be able to sale the property to recover the rates owing.

The question of course is whether such procedure was followed in the sale of Kaka Motel.

Because there is a valid court order on record the assumption is that bullets (i) and (ii) above were complied with. Meaning as we see things that whether or not the

purported sale of Kaka Motel is illegal, unlawful and therefore invalid depends on whether or not the said sale complied with the court order in **Mzuzu City Assembly v A N Phiri** as read with bullets (iii) to (v) above and section 91 above-mentioned. But having said the foregoing let us by way even of *obiter* say a word or two about the concerns raised by the plaintiff *vis a vis* the said court order. **********

The plaintiff, as this court understood him, was of the view that the court order envisaged in section 91 had to be one obtained *inter parties*. That the order herein having been obtained *ex parte* it must be deemed to be of no effect seeing as the matters under consideration touched on constitutionally guaranteed rights in this case the right to property.

With the greatest respect we think that on another day in another case the Plaintiff's concerns would have been worth seriously pursuing. The writ is dated July 19th 2005 which is also the date of the court order authorising the seizure and sale by public auction of *inter alia* Kaka Motel. Surely some procedural necessity [most likely service on the defendants] must have been dispensed with which lends credit to the contention that the order was obtained *ex parte*. If such is the case then without in any way detracting from the validity of the above order let us say that we agree with the plaintiff that where the matter in issue involves constitutionally protected rights [e.g. the right to property] nobody should be deprived of such right[s] unless and until they have first been heard. We would actually opine that the court process envisaged in section 91(2) of the LGA is one that ensures that the rate payer has their day in

court. An *ex parte* process would by necessary implication thus be excluded. But like we say above all this is *obiter*. The fact is that there was a court order in favour of the first defendant in the following terms:

> *'The plaintiff do forthwith seize the property of the defendant herein and sell it by public auction in satisfaction of the rate due with costs.*
>
> *The said sale is to be without prejudice to the rights or the contentions of the parties herein'.*

In terms of that order two things have to be satisfied. Firstly the sale had to be by public auction and secondly it had to be without prejudice to *inter alia* the rights or contentions of the parties to **Mzuzu City Assembly v A N Phiri**. We do not want to sit here and pretend to interpret the order. We do think however that the latter part of the order referred to the parties' rights to the seized property and by extension to the proceeds from any sale thereof.

From the point of view of section 91 again two issues had to be addressed. Firstly the first defendant had to give notice of the impending sale in the gazette and a newspaper circulating within the local government area i.e. within Mzuzu City Assembly. Secondly the property owner in this case the plaintiff had to fail to redeem the property before Kaka Motel could be deemed to have been sold to recover arrears of rates. See section 91(4) above cited. The questions to be asked and answered therefore are:

Was Notice Of The Impending Sale Of Kaka Motel Given In Terms Of Section 91(3)?

Black's Law Dictionary 6th Edition at page 1061 defines notice *inter alia* as:

> *'Information concerning a fact, actually communicated to a person by an authorised person or actually derived by him from a proper source, and is regarded in law as 'actual' when the person sought to be affected by it knows thereby of the existence of the particular fact in question'.*

In the context of section 91 of LGA it is clear that the notice in subsection 3 is intended to notify the ratepayer/property owner of the impending sale of his property for arrears of rates. It is also intended to afford the ratepayer/property owner a chance to redeem her property in terms of section 91(4). Whatever notice is given courtesy of subsection 3 therefore has to be one that is reasonable in the circumstances. One, in our view humble view, that allows the rate payer to exercise his right to redeem the property while at the same time not allowing the unscrupulous rate defaulter a chance to frustrate the rate recovery process. The debate about notice therefore is not just about whether or not notice was given but also whether such notice was in the circumstances adequate and/or sufficient. In the context of the instant case we ask ourselves the questions firstly whether the plaintiff was notified of the impending sale of Kaka Motel in lieu of arrears and secondly whether such notice was sufficient/adequate. Put differently whether the notice was such as would have allowed the plaintiff to exercise his right to redeem the property.

Notices are covered in paragraphs 24 to 37 of Mr Sam Chirwa's affidavit of June 30th 2006. Exhibit SC12, which addresses issues not just of the notice but also of when and where, if at all, Kaka Motel was sold must also be considered.

According to Exhibit CGS1, a document authored by the first defendant, Kaka Motel was sold on August 31st 2005. If that be true the relevant advertisements can only be those of 10th August 2005, of 20 – 21 August 2005 and of 29th August 2005. A closer look at them though discloses that these advertisements could not have been notices of an impending sale of Kaka Motel. Firstly they are in respect of a 1st September 2005 sale and not of a 31st August 2005 sale. Secondly they are in respect of a sale that was to take place at Chenda Motel and yet Mr Sam Chirwa says Kaka Motel was sold at Mzuzu Hotel. Thirdly, and even if the dates and venue of the impending sale were appropriate, the notices were so short as not to afford the plaintiff a chance to redeem his property. In other words they did not amount to sufficient and/or reasonable notice as discussed above. Much the same can be said if the notices were in respect of the September 1st 2005 sale. They talk of a sale that was to take place at Chenda Motel when Mr Sam Chirwa says the sale took place at Mzuzu Hotel which fact is itself not true. Exhibit GHBS10, a letter from Mzuzu Hotel denies in the clearest of terms that no public auction sale of property took place at the said hotel either on August 31st 2005 or on September 1st 2005. Any which way you want to look at it the conclusion has to be that no notice was given to the plaintiff about the impending sale of Kaka Motel. He could not have been aware of such sale. He could

not therefore have redeemed Kaka Motel were he so minded. The advertisements making up Exhibit SC12 were clearly a charade/sham calculated to give the impression that property including Kaka Motel would be sold on 1st September 2005 at Chenda Motel when the same had been sold on 31st August 2005 at some place somehow. The answer to the question whether or not a section 91(3) notice was given is in the negative. The question of reasonableness or sufficiency of such notice does not even arise.

Was The Sale By Public Auction?

The court order specifically provided that the sale be by public auction.

Black's Law Dictionary 6th Edition at page 131 defines an auction as:

> *'A public sale of property to the highest bidder by one licensed and authorised for that purpose'*.

Three questions need to be answered in our view. First was the sale a public sale i.e. done in public? Secondly was the sale conducted by an auctioneer properly so called i.e. a person licensed to carry on the business of an auctioneer? Thirdly was the auctioneer authorised to conduct the sale?

Public Sale

Assuming there was a sale the question is whether the sale was held at a public place. Mr Sam Chirwa deponed that the sale took place at Mzuzu Hotel on September 1st

2005. Exhibit CGS1 authored by an officer of the first defendant says the sale took place on August 31st 2005. Then there is exhibit GHBS 10 to which we have made reference above. It unequivocally states that no public auction sale of property took place at Mzuzu Hotel either on August 31st or September 1st 2005. One may argue that the sale took place at Chenda Hotel which is the place mentioned in Exhibit SC12. The only problem is of course that if such was the case Mr Sam Chirwa would have said so in his affidavit. That he did not and more importantly that Chiharo Botha, the second defendant's Managing Director, did not can only mean that it never took place at Chenda Motel. That raises the spectre, to which we have hinted at above, not just of whether the sale took place at a public place but whether the sale took place at all. That though should not unduly bother us now. What should and what is important is that the balance of probabilities does not allow us to determine where the sale took place and secondly to conclude whether wherever the sale took place can properly be called a public place. Was Kaka Motel sold at a public place? The answer is in the negative.

Was Kaka Motel Sold By an Auctioneer? Was the auctioneer duly authorised to sale Kaka Motel?

The two questions can be taken dealt with together by asking the question whether Kaka Motel was sold by a duly authorised auctioneer. The defendants answer the question in the positive. They point to the court order of July 19th 2005 which in their

view must be read to include both defendants the second defendant being the first defendant's lawfully authorised agents. Lawfully authorised agents of the first defendant they might be but we do not think that the second defendant had lawful authority to sale *inter alia* Kaka Motel in the context of this case. The order of July 19th allowed the plaintiff to *inter alia* **sell by public auction** [our emphasis]. We would think that any authority which the first defendant could give in the above regard would only be to an entity that can lawfully sale by auction. As we have found above the second defendant could sale by auction but not lawfully so. They were not registered under the enabling Act. They could not therefore in our opinion have been granted authority the exercise of which would have required or necessitated them breaking the law. Our conclusion is that the second defendant could never have had the lawful authority to sale by public auction Kaka Motel for the simple reason that it did not have the capacity to lawfully sale by public auction.

Regarding whether or not the purported 'sale by public auction' was conducted by an auctioneer properly so called we remind ourselves that we have hereinabove debated who is and who is not an auctioneer. The long and short of it is that the auctioneer envisaged in the LGA and therefore in the court order of July 19th 2005 can only be one who is duly registered under the enabling Act. The second defendant not being so registered could never have been the auctioneer contemplated in either the enabling Act or the court order of July 19th 2005. The purported sale of Kaka Motel was therefore never conducted by an auctioneer properly so called.

If we may wind up our debate on whether the sale of Kaka Motel was illegal, unlawful and therefore invalid our understanding of the issues was that the sale could only have been legal/lawful if it proceeded in the manner prescribed by the High Court in Civil Cause Number 2012 of 2005 **Mzuzu City Assembly v A N Phiri and Others** as read with section 91 of the LGA. As our discussion above shows it accorded with neither. It means that the purported sale of Kaka Motel could not have proceeded lawfully or legally. It actually is invalid.

Whether Mzuzu City Assembly Had the Capacity to Enforce Issues of Rates in the Absence of Councillors

In the understanding of the plaintiff a City Assembly consists of a Mayor, Councillors and staff. At all material times according to the plaintiff Mzuzu City Assembly had neither a Mayor nor Councillors. That does/did not accord with the LGA or the Constitution the result of which is firstly that defendant cannot not be regarded as a lawfully constituted local authority as at law known and secondly that it could not have made any legally binding decision in so far as the enforcement of city rates is concerned. It simply had no mandate.

The first defendant while agreeing that it had no Mayor or Councillors argues in paragraphs 41 and 42 of Mr Sam Chirwa's affidavit that:

41. *The first defendant refers to paragraph 35 of the plaintiff's affidavit and will contend that it has the necessary mandate to transact its business and issue orders and enforce bylaws and laws even in the absence of a Mayor and Town Councillors.*
42. *The exercise of disposing of the properties in question started in 2002 as shown in the court process of that year, when the Councillors were still in office, as their term ended in March 2005. That even if there were a vacancy on members of the Assembly, s. 42 of the General Interpretation Act provides that such a vacancy does not nullify any act of the assembly'*. [**Sic**]

In their written arguments the first defendant *inter alia* argues and we quote:

> *'True there is a vacancy in for the Mayor and Councillors for the City of Mzuzu. But as this section puts it, their powers (i.e. the office) are not affected by such vacancy. Therefore when the Chief Executive of the Assembly made the decision to auction the houses which decision he is entitled to make on behalf of the Assembly as per s. 11 of the Local Government Act, that decision remains valid.*
> *The same can be looked at from a necessity point of view. If we say that all acts done by the Chief Executive are invalid because there is no assembly properly instituted, then at the end of the day, life in the city will come to a stand still. Out of necessity the acts of the Chief Executive ought to be recognised even in the absence of the Mayor and Councillor'*. [**Sic**]

Before we get to debate the arguments for and against maybe we should give the full compliment of the statutory provisions under consideration.

Section 42 of the General Interpretation Act *inter alia* says:

> *'where by or under any written law, any body, council, commission, committee or similar body whether corporate or incorporate is established, then unless a contrary intention appears the powers of such body shall not be affected by :*
> *(a) Any vacancy in the membership thereof*``.

As to what constitutes an Assembly the starting point has to be the Constitution for it

is trite that all laws must be read and applied subject to the Constitution. See section 5

of the Constitution. Section 147 of the Constitution provides *inter alia* for the composition of local government authorities:

> *(1) Local government authorities shall consist of local councillors who shall be elected by free secret and equal suffrage by the registered voters in the area over which that local government authority is to have jurisdiction ……..*
> *(2) The offices of local government shall include mayors in cities and municipalities and local councillors in all areas and they shall have such functions powers and responsibilities as shall be laid down in an Act of Parliament.*
> *(3) There shall be, in respect of each local government authority, such administrative personnel, subordinate to local councillors as shall be required to execute and administer the lawful resolutions and policies of those councillors.*
> *(5) Local government elections shall be take place in the third week of May in the year following the year of the general election of the National assembly, and local government authorities shall stand dissolved on the 20th day of March in the fifth year following their election:*
>
> *Provided that where it is not practicable for the polling to be held in the third week of May, the polling shall be held on a day, within seven days from the expiration of the third week of May, appointed by the Electoral Commission'.*

Section 5 of the Local Government Act provides:

> *'(1) for every local government area there shall be an Assembly consisting of –*
>
> *(a) one member elected from each ward within the local government area;*
> *(b) traditional authorities and sub-Traditional Authorities from the local government area as non-voting members ex-officio;*
> *(c) Members of Parliament from the constituencies that fall within the local government area as non-voting members ex-officio;*

(d) *Five persons as non-voting members to be appointed by the elected members to cater for the interests of such special interest groups as the Assembly may determine'.*

Section 10 provides that:

> *'A member of the Assembly referred to in section 5(1) (a) shall be elected in accordance with Local Government Elections Act'.*

Section 11 says the following about the functions of the Chief Executive:

> *(1) There shall be in the Assembly an officer designated as the Chief Executive Officer of the Assembly who shall be the head of the Secretariat of the Assembly.*
> *(2) The Chief Executive Officer of the Assembly shall be appointed by the Assembly.*
> *(3) The Chief Executive Officer of the Assembly shall, subject to the general or special direction of the Assembly, be responsible for-*
>
> *(a) Implementing the resolutions of the Assembly;*
> *(b) The day to day performance of the executive and administrative functions of the Assembly;*
> *(c) The supervision of the departments of the Assembly; and*
> (d) *The proper management and discipline of the staff of the Assembly'.*

From a factual point of view it is not in dispute that the first defendant has been operating without a Mayor and Councillors since March 2005. The question we need to answer is whether such absence equals, in simple terms, an inability on the part of the first defendant to make the decision to enforce the payment of rates.

As we understood the first defendant it argued that the first defendant can in absence of a Mayor and Councillors lawfully enforce issues of city rates. Four reasons were advanced. Firstly that the decision to collect rates was made in 2002 when councillors and the Mayor were in place. All that the Chief Executive subsequently

did was to see through such decision by taking what are essentially administrative decisions. Secondly, that the absence of a Mayor or Councillors is cured by section 42 of GIA. Thirdly, that the Chief Executive can, in the absence of a Mayor and Town Councillors, validly make decisions on behalf of a local authority [in the context of this case the first defendant] under section 11 of the LGA. Fourthly the first defendant called upon the doctrine of necessity. It was essentially argued that whatever decisions the Chief Executive made in the name of the Assembly must be deemed to be lawful the absence of the Mayor and Councillors notwithstanding because the opposite was impossible to behold. Local government would grind to a standstill.

Fortunately for us we are not in debating this issue reinventing the wheel. The case of **Zomba Municipal Assembly v Council of the University of Malawi** Civil Cause Number 3567 of 2000 [Principal Registry unreported] commented upon this matter extensively. If we may we reproduce the said court's views from page 18 to 22.

> *'Dr Mtambo of Counsel for the defendant sought to rely on a decision of the High Court where it was reportedly held that councils, now called assemblies, had no mandate to collect or revise rates in the absence of councillors.*
> *This court does not agree with the submission of the defendant. I will also demonstrate that the purported decision of this court in the so called Malawi Congress Party case leads to an absurdity and must now be corrected.*
> *It is well to note that every local government authority has a constitutional responsibility to deliver essential and local services to people over whom it has jurisdiction. This responsibility can only be achieved if the said local government is able to levy rates. To achieve this the Local Government Act has given Assemblies the authority to levy rates. This authority cannot however be delegated. Further, it would appear that the statute is silent on*

what should happen, as regards the levying of rates, where for one reason or another there are no people to constitute an Assembly. Indeed, the same is true with the situation where Assemblies are dissolved. This creates an absurdity. Now the question that comes to mind is should there be no levying of rates where members constituting an assembly are dissolved or where for one reason or another there are no councillors to form part of an Assembly? This court is of the view that this lacuna creates a situation where the obligation of a local authority to deliver services is rendered invalid if it were to be accepted that it cannot levy and/or collect rates where members of an Assembly are dissolved. This is the case because local authorities do not cease to provide essential services even where there are no councillors or members to constitute an Assembly. In my judgment, the constitutional and statutory duty, on the part of the Assembly, to provide essential services is a continuing one. In point of fact, it is important to always remember that there is a special relationship between a local authority and a rate payer. This relationship entails that the rate payer is obliged to pay rates and that the local authority has the right to collect them and the obligation to use the proceeds for delivery of services.

As mentioned earlier, the local authorities are obliged, under both the constitution and the Local Government Act, to provide essential services to the residents of the Assemblies. This they have to do whether the body that constitutes an Assembly has been dissolved not. Indeed, this court doubts if the legislature intended that the rate payers should not pay rates when members of an Assembly are unable to constitute themselves as provided for in the Local Government Act. In arriving at this decision the court was alive to the fact that any interpretation of the Local Government Act that results in invalidating the constitutional and statutory duty imposed on an Assembly to levy and collect rates is unreasonable and must be avoided. Such an interpretation would in point of fact lead to an absurdity which must be avoided at all cost. It is, therefore, imperative that in interpreting any statutory provision pertaining to the levying and collection of rates the court ought to favour an interpretation that would lead to constitutional validity. It has reasonably been possible, in my judgment, to interpret the Constitution and the Local Government Act in a way that enables the Assemblies to levy and collect rates. As stated earlier the Assemblies are obliged to continuously provide essential services to residents of the Assemblies. The court must bear in mind the duties of the Assemblies in this regard and must interpret the provisions of the Local Government Act in a way that is consistent with the obligations of the Assemblies.

> *For the reasons given above this court finds and concludes that the plaintiff was legally entitles to levy and collect rates on all the immovable property in the designated areas in the Municipality of Zomba'*. [**Sic**]

At the outset let us say that there are certain matters of principle on which we are in total agreement with the court in the **Zomba Municipality Case**. We thus do agree for instance that the law must at all times be interpreted to avoid absurdities. We also agree that the relationship between an Assembly and the rate payers is one in which the former levies and collects rates in exchange for rendering certain services to the public. This relationship, it is equally true, should be a continuing one and it is imperative that the law, i.e. the Constitution and the LGA, be at all times interpreted to reflect this special relationship. We would therefore think it reasonable to conclude, as did the court in the **Zomba Municipal Case,** that as much as possible the law must be interpreted in a way that should not permit a situation where Assemblies cannot deliver services because they are incapable of levying and collecting rates. Rather the law should be interpreted in a manner that allows the Assemblies to continue to levy and collect rates so that they in turn can provide whatever services the law mandates them to provide to their rate payers.

While not in any way subtracting from the immediately foregoing we must say that we are firm in our belief that Assemblies must, like all institutions of government, be run in accordance with the law. It is another of our firm views that courts must never in the name of avoiding absurdities sanction that which is clearly unlawful. In the

context of local authorities our position is multifaceted. Firstly that only lawfully constituted Assemblies can and must be allowed to levy and collect rates. Secondly that only lawfully constituted Assemblies must be expected and allowed to deliver services expected of them under the Constitution and the LGA. Thirdly that the levying and collection of rates must itself be done in accordance with the law.

What then is this duly constituted Assembly that must be allowed to levy and collect rates and render services as by law mandated? This question we must answer at two levels. Firstly at the general level in relation to all local authorities/assemblies and secondly in the context of the question actually before us namely whether the second defendant had the capacity to enforce issues of city rates in the absence of councillors. We realise that the general is perhaps not directly an issue herein. But we think that we must debate the general in order to answer the specific.

A duly constituted Assembly is, in our view, one whose composition complies with section 147 of the Constitution and section 5 of the LGA. It must have ward councillors duly elected in an election organised, conducted and supervised by the Electoral Commission in accordance with the Local Government Elections Act Number 24 0f 1996. If an Assembly does not have councillors it is not a duly constituted Assembly. Consequently it has no business doing that which duly constituted assemblies by law do. In the context of the instant case and unlike in the **Zomba Municipality Case** our view is that an unconstituted Assembly should not and cannot *inter alia* lawfully levy and collect rates. Similarly it cannot purport to

and will not be expected to provide such services as are at law expected from properly constituted Assemblies. Which brings us to the questions raised by the defendants and the **Zomba Municipal Case** against views such us we have expressed immediately above.

Firstly it was argued that the rates in issue herein were decided upon by a duly constituted Assembly in 2002 and that all the Chief Executive did thereafter was to take the necessary administrative actions to see through such decision. Secondly that the absence of councillors is cured by section 42 of GIA. Thirdly that the Chief Executive of an Assembly can in the absence of Councillors make decisions on behalf of an Assembly in terms of section 11 of the LGA. Fourth was the doctrine of necessity and fifthly the argument advanced in the **Zomba Municipal Case** that to interpret the absence of councillors to mean the absence of an Assembly or the lack of a mandate to exercise the powers of one would lead to an absurdity which the courts must at all times endeavour to avoid.

The first argument and maybe the third are, we think, specific to the instant case [and the first defendant] and we shall deal with them separately from arguments two, four and five which are of a general nature in that they touch on Assemblies generally.

The way to resolve concerns two to five lies, in our view, in having a good look and understanding of the manner in which councillors attain office, their tenure of office, their duties and functions and those of the Secretariat including of the Chief Executive. It is clear from such exercise that once elected a councillor stays in office

for five years unless he is removed for cause or he resigns. For the councillor who attains office via a by-election she stays in office for the remainder of the five year term. In that scheme the only time the Assembly will have no councillors is when the Assembly stands dissolved on March 20th of the fifth year. And when that happens the solution is not, we think, to call in the doctrine of necessity or the need to avoid absurdities. It is not even to allow the Secretariat through the Chief Executive to masquerade as an Assembly. It is to call for new local government elections which must by law be held in the third week of May or seven days thereafter. If the elections cannot for one reason or the other be held within that time frame the powers that be can, by amending the relevant laws, extend the life of Assemblies while arrangements are afoot to hold local government elections. Some might remember [and this only by way of example] that the 1999 General Elections were held on a day other than the one laid down in the Constitution. All the Executive had to do was to amend the Constitution. See section 67 of the Constitution. As to the period in between 20th March and the swearing in of new councillors [where this proceeds strictly and lawfully in terms of section 147(5) of the Constitution] the Secretariat will as we conclude hereinbelow be executing the resolutions and policies of the vacating Assembly whose legality must be taken to subsist until a new Assembly is sworn in which shall be soon after the local government elections in May or such other date as shall have been by law designated. We cannot however where elections have not, in breach of section 147(5) taken place just to avoid imaginary absurdities or ensure

continuity of the provision of services, interpret the law to find an Assembly where the preceding one has been dissolved, no local government elections held, no new counsellors elected and nothing done to extend the tenure of the preceding assembly. When we talk about continuity of the duty on the Assemblies to provide services and want to marry that to the residents' continuing duty to, for instance, pay rates that should move along with a duty on the powers that be to continuously apply and abide by the law relating to the tenure of Assemblies. So that if the people must continuously pay city rates they must only do so to a continuously lawfully constituted Assembly for it only such an Assembly, in our view, that has the authority to lawfully execute the local government mandate. Looked at in the above fashion there will never be an instance where there will be no councillors and therefore no Assembly. Except of course during the brief period between the dissolution of the preceding assembly and the swearing in of a new one after elections for which a remedy already exists at law. There will also be no absurdity of the kind that troubled the court in the **Zomba Municipal Case**. There will always be an assembly which will not only always levy and collect rates but also provide services. Where however the law relating to tenure is not complied with i.e. local government elections are not held within the specified time frames after the dissolution of the preceding Assembly and no extension made of such Assembly's tenure of office, we find it unconscionable to allow the Secretariat to hide behind what is essentially a breach of the law and conduct themselves as if they were a lawfully constituted Assembly.

Some might ask whether in the artificial absence of councillors and therefore Assemblies there should also be a stop to services normally rendered by them. The answer is in the negative. Some might go on to ask 'but who would carry out such services? Where would the money to pay for such services come from?'

In the world we [the courts] live every disregard for the law has its consequences. In the realm of criminal law one must be ready *inter alia* to go to gaol. In the realm of local government those that disregard the law about tenure of councillors and the conduct of local government elections must be ready to face the consequences. One such consequence is that there will be no lawfully constituted Assemblies. The other is that no rates will be levied or collected. Yet another is the possibility that there will be neither money to fund nor an agency to render the services normally rendered by Assemblies. Central government has the responsibility to call for local government elections and oversee local government generally. Where it for one reason or the other fails to deliver on its obligations, which seems to be the case herein, it should like all who disregard the law face the consequences. In this case it should be prepared to provide the wherewithal with which services rendered ordinarily by Assemblies would, most likely through the Secretariat, be delivered. But, we must emphasise, the fact that the Secretariat continues to deliver those services does not turn it into a lawfully constituted Assembly. We reiterate therefore that a holding that the absence of councillors equals no Assembly does not result in an absurdity or a

failure by local authorities to deliver services. On the contrary such a holding strengthens the rule of law and ensures that local government is run as per law decreed. It also prevents loose canons from masquerading as Assemblies when they are not. A contrary holding naturally waters down the rule of law and betrays democracy. It takes away the people's right to choose their representatives at local government fora.

Section 42 of the GIA is of no relevance in this debate. The section deals with vacancies in the Assembly and their effect thereon. It says, in simple language, that a vacancy in any one of the wards shall not have an effect on the validity of an Assembly's decision. In the instant case we are not talking about vacancies in an Assembly. We are talking about nonexistent Assemblies. There can not therefore be talk of a vacancy or vacancies. And if we may, by some kind of contrast, put matters to rest whereas a vacancy is filled via a by-election the absence of a whole Assembly is remedied by the holding of fresh local government elections under the Local Government Elections Act.

Much of the immediately foregoing can be said about section 11 of the LGA as sought to be applied herein by the defendants. The function of an Assembly's Chief Executive Officer and therefore the Secretariat is to implement its resolutions and policies. The Chief Executive Officer and/or the Secretariat cannot by themselves make resolutions and policies. In the language of rates they can not make a resolution to levy and/or collect rates. They can only implement an Assembly's resolution to

levy and collect rates. To read section 11 as having the effect of allowing the Secretariat to make resolutions and/or formulate policies on behalf of the Assembly would be to create an Assembly by the backdoor. And as we all know the law does not permit one to get through the back door that which they cannot get through the front door.

The doctrine of necessity also has no application herein. As we understood the defendants it is necessary that Assemblies be deemed to still be in existence the absence of councillors notwithstanding because to proceed otherwise would bring local governance to a standstill. That local government might come to a standstill might be true. We have no doubt however that those who deemed it fit to dissolve Assemblies and hold no local government elections were well aware of the consequences of their actions. We have above narrated some of them. The way to deal with such consequences however is not to call upon the doctrine of necessity. It is to call for fresh local government elections so that new Assemblies can come about. To resort to the doctrine of necessity in these circumstances would in effect be to legalise the illegal. We, the courts, would be sanctioning the erosion of the rule of law and constitutionalism and allowing those who do not derive their power from the people to govern. And lest we forget section 147(1) of the Constitution provides:

'Local Government authorities shall consist of local councillors who shall be elected by free, secret and equal suffrage by the registered voters in the area over which that local government authority is to have jurisdiction ……'.

Section 6 of the Constitution provides *inter alia*:

> *'save as otherwise provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections held in accordance with this Constitution in a manner prescribed by an Act of Parliament'.*

While section 9 provides:

'the Judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution in an independent and impartial manner with regard only to legally relevant facts and prescriptions of law'.

If we may conclude the debate on what generally constitutes a lawful Assembly it is our firm view that no entity can purport to exercise the powers of an Assembly unless the same is constituted in terms of section 147 of the Constitution as read with section 5 of the LGA. Where therefore, as happened in this case, an Assembly ceases to have councillors it loses its status and therefore powers as an Assembly. Its Secretariat cannot and should not be allowed to deal with issues that require a resolution by the Assembly.

The next question is whether the first defendant in the circumstances of this case had the mandate to deal with issues of city rates.

The first defendant's story is that a resolution was made in 2002 by a lawfully constituted Assembly to collect rates. That all the Secretariat did thereafter was to take administrative steps in order to effect that resolution. As a matter of general principle we do agree that once an Assembly passes a resolution it is up to the Secretariat to implement it. In doing so they may be under the general supervision of the Assembly but it is not, in our view, necessary that they seek authority each and every step of the way. In the matter of rate collection once a resolution is made by the

Assembly to collect it is up to the Secretariat how to proceed thereafter as long as of course they abide by the law. They may decide to go to court. They may decide just to issue demand letters. They may indeed decide to go door by door demanding for payment. Those are the kind of decisions that the Secretariat can make under section 11 of the LGA. The question in this case narrows down to whether the second defendant by resolution lawfully issued authorised the levying and collection of city rates in 2002.

Our system of justice is adversarial. He who alleges must prove that which he alleges on a balance of probabilities. In this instance it is for the first defendant to prove the above. We also remind ourselves that the second defendant obtained a court order to seize and sale *inter alia* Kaka Motel. The assumption has to be that the first defendant had resolved that rates be levied and collected. What the Secretariat did beyond that was to implement such resolution. It was up to them to do so by seizing and selling. On the specific question whether the first defendant could deal with issues of enforcement of city rates in the absence of councillors our answer is, subject to the general principles debated above, in the positive. Once an Assembly has resolved to collect city rates it is up to the Chief Executive and the Secretariat to implement it in any lawful manner they deem fit.

Whether the Plaintiff [Trading As Kaka Motel] and the *Bona Fide* Villagers of Luwinga Village Are Supposed To Pay Rates

In his summons the plaintiff split the above issues. In our view we think they raise the same matters. It is for that reason that we have decided to debate them together.

The plaintiff argued that he and the villagers of Luwinga village cannot pay rates because they are in their village and one cannot lawfully be expected to pay rates in that situation. Secondly he says that he cannot be expected to pay rates when the first defendant and central government have reneged on an agreement to resettle him and his people away from Luwinga Village which until the first defendant was granted city status was their village.

The first defendant was preoccupied with geography. It argued that since Kaka Motel is within its boundaries the plaintiff is liable to pay city rates.

It is clear to us that the plaintiff did not bring this action in a representative capacity. He brought it for his own benefit. It is equally clear that the *bona fide* villagers of Luwinga Village are therefore not a party to this action. That being the case we do not think that we have any business discussing their rate liability. But more than that we think that a decision whether or not the said Villagers should pay rates is one that should be made by a lawfully constituted Local Authority in due exercise of its powers and functions as by law granted. The Judiciary's role would only be to judicially review, if need be, such decision. This court would if it made that decision correctly open itself to an accusation that it is under the thin disguise of exercising judicial authority arrogating to itself the powers of a lawfully constituted local

authority. Powers it does not have. We would in fact be in no worse a situation than those we have hereinabove accused of masquerading as Assemblies when they are in fact not.

As for the plaintiff we have concluded above that the payment and collection of rates depends on the existence of a lawfully constituted local authority. It is that local authority that makes the decision whether rates are payable and if yes the quantum thereof. In the instant case there is a court order to the effect that rates owe from the plaintiff to the first defendant. For as long as that judgment remains on record the rates remain owing and payable. If the plaintiff wants to challenge his liability to pay rates he should go back and do that in the context of that same judgment. As we have endeavoured to show throughout this case has been about what happened after the order not before. So the answer is in the positive. The plaintiff is liable to pay city rates.

Immunity

The defendants argued that they cannot be called to book in respect of the purported sale of Kaka Motel because they are immune from liability in terms of section 91(8) of the LGA. We quote the relevant part of the section in full.

> *'(8) No liability for error or irregularity shall attach to the Assembly or employee of the Assembly arising from the exercise by the Assembly of powers granted under this section'.*

In their skeletals the defendants argue:

> *'By s. 91(8) again, 1st defendant is not liable for any error or irregularity that the plaintiff may want to attach to the 1st defendant about the sale. This is hard and fast rule which is applicable in the present circumstances. The 2nd Defendant having been employed by the 1st Defendant to sale the houses on their behalf, the protection extend to them'.* [**Sic**]

As we understand the defendants they cannot be held accountable no matter how they exercised their powers under the LGA. That, in our view, is not the correct interpretation of section 91(8). Like we have said before it is the duty of any and all Assemblies to at all times conduct their affairs in accordance with the law including the Constitution. See sections 4 and 10 of the Constitution. Section 91(8) does not therefore grant Assemblies *carte blanche* to proceed in whatever they do in total disregard of all applicable laws. On the contrary section 91(8) must be interpreted in such a way that it does not snipe at pre-existing rights or erode constitutionalism and the rule of law. It must be interpreted in a way that enhances local authorities' adherence to constitutionalism and the rule of law. That can only happen if section 91(8) is considered in the light of other pieces of legislation that have a bearing on the matter[s] under consideration. Further, we think it trite that any provision of the law that seeks to limit or detract from an individual's rights must be interpreted strictly. Accordingly it is our conclusion that if section 91(8) grants some immunity it is only

in respect of errors and irregularities which must be distinguished from illegalities. For the doubters **Black's Law Dictionary** 6th Edition page 747 defines an illegality as:

> *'That which is contrary to the principles of law, as contradistinguished from mere rules of procedure'.*

At page 829 it defines an irregularity as:

> *'The doing of an act that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Violation or non observance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner. The technical term every defect in mechanics of proceedings, or the mode of conducting an action or defence, as distichal from defects in pleadings. Term is not synonymous with 'illegality'.*

An error is *inter alia* defined on pages 542 – 543 as:

> *'A mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law. …….. a mistake of law, or false or irregular application of it, such as vitiates the proceedings and warrants the reversal of the judgment. An act involving a departure from truth or accuracy; a mistake; an inaccuracy; as, an error in calculation'.*

In our view illegalities should be treated differently from errors and irregularities. Indeed we ordinarily would have no problem in interpreting section 91(8) as granting immunity in respect of errors and irregularities. But we say no to extending the same to illegalities. To do so would be to legalise the illegal seizure and sale of rate payers' property. It would amount to sanctioning arbitrary deprivation of people's property

which flies in the face section 28 of the Constitution. The immunity mentioned in section 91(8) therefore does not cover breaches of the law but only non-adherence with such form and procedure [not substance] as does not, in fact or appearance, breach any applicable law. The acts of the defendants complained of herein cannot therefore be saved by the said section in so far as the same are illegal.

CONCLUSIONS/RELIEFS SOUGHT

The plaintiff sought:

An order of the court that the sale by auction of commercial property known as Plot Number MZ/819/0 where there is Kaka Motel at Luwinga in the City of Mzuzu was illegal, unlawful and therefore invalid. [Sic]

The purported sale was not by public auction as ordered by the court. It also flouted the stipulations in section 91 of the LGA. The sale was clearly illegal, unlawful and therefore invalid. The order prayed for is granted.

An declaration that Kesale Auctioneers and Estate Agents has no mandate to advertise, valuate, sale by auction or act as an estate agent because the said Kesale Auctioneers and Estate Agents is not registered under section 4 of the Land Economy Surveyors, Valuers, Estate Agents and Auctioneers Act Cap 53:08 of the Laws of Malawi [**sic**]

Clearly Kesale Auctioneers and Estate Agents were not registered with the enabling Act. They could not therefore advertise, valuate, sale by auction or act as an estate agent. We grant a declaration that the second defendant had no mandate to advertise, valuate, sale by auction or act as an agent in respect of Kaka Motel.

A determination of the court as to whether Mr G H Bandawe (trading as Kaka Motel) is supposed to pay city rates to Mzuzu City Assembly in the circumstances that where he stays is supposed to be his village and Malawi Government in conjunction with Mzuzu City Assembly has not relocated him away from city boundaries as agreed between Malawi government, Mzuzu City Assembly and Local government Leaders of Luwinga Village Community [**sic**]

There is no determination for the court to make the matter having been decided in **Mzuzu City Assembly v A N Phiri** Civil Cause Number of 2005 [Principal Registry, unreported].

The declaration by the court that all bona fide villagers of Luwinga Village Community should be exempted from issues of city rates until the Malawi Government in conjunction with Mzuzu City Assembly sort out the issue of relocation of villagers around Luwinga Community away from land controlled by the Mzuzu City Assembly.[**sic**]

We decline to make such a declaration. The said villagers are not parties to this matter and the plaintiff did not bring this action in a representative capacity. But even more it is not for the courts to decide whether or not this or that person should pay city rates.

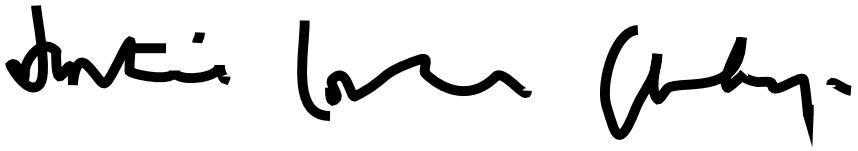
A determination by the court whether Mzuzu City Assembly can enforce issues of city rates in the absence of Town Councillors. [**sic**]

Generally no Assembly is lawfully constituted in the absence of councillors. Whoever purports to exercise the powers and functions of an assembly in those circumstances does so without legal sanction. In the circumstances of this case the first defendant could enforce issues of city rates the same having been decided on by a lawfully constituted Assembly prior to its dissolution.

COSTS

These are in the discretion of the court. In exercise of such discretion we grant them to the plaintiff as to 80% thereof if taxed in the alternative whatever the parties might agree. It is our view that with a bit of calmness and sobriety of mind this matter would not have been the subject of litigation.

DELIVERED in open court at Mzuzu this day 12th day of November 2007.



L P Chikopa

JUDGE