



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 190 OF 2005**

BETWEEN

HANIF KHANSIA t/a CHIPPEI INTERNATIONAL PLAINTIFF

-AND-

BLACKTOP SURFACES MALAWI1ST DEFENDANT

CORAM : T.R. Ligowe : Assistant Registrar

Wadi : Counsel for the Plaintiff

Mussa : Counsel for the Defendant

ORDER

The plaintiff brought an inter-partes summons for attachment of the defendant's property under Order VIII rule 1 of the Rules of the High Court. The plaintiff would like the defendant's:

- (a) Nissan BLK 1034
- (b) Mazda Drifter BM 6532
- (c) Mazda Drifter BM 6547
- (d) Isuzu pick up NHN 886 GP
- (e) Asphalt plant at Nanjiri Quarry
- (f) Crusher parker in Mzuzu
- (g) 938 F front and loader at Nanjiri Quarry
- (h) W120 Kunatsho front loader at Nanjiri Quarry (damaged)

- (i) Bell Truck Dumper at Nanjiri Quarry (damaged)
- (j) Neumatic Roller Deutz PR 25 at St Johns, Blantyre road
- (k) Neumatic Roller Deutz PR 26 at St Johns, Blantyre road
- (l) Neumatic Roller Small at St Johns, Blantyre road
- (m) Chip spreader at St Johns, Blantyre road
- (n) 90 Bomag at St Johns, Blantyre road
- (o) 65 Bomag at St Johns, Blantyre road
- (p) 1 Paver BA 35
- (q) Ford Tractor MP 165 (scrap)
- (r) Slurry Truck Mercedes Benz CP 559 at St Johns, Blantyre road
- (s) Caravan in Salima
- (t) 7 ton Mercedz Benz Tipper at Nanjiri Quarry
- (u) Colt pick up (scrap), and
- (v) Excavators at Nanjiri Quarry

attached until the final outcome of his application to assess interest as a further court order or until the defendant furnishes security for his claim.

The Plaintiff in this case got a judgment on admissions against the defendant for the sum of K10 974 346. 03 plus interest at the current bank lending rate. He has since filed a notice of appointment to assess the interest.

This application is supported by the plaintiff's affidavit in which he deposes among other things that, since the commencement of the action and after obtaining the judgment the defendant has made payments to Chippie International in cash and by a voluntary arrangement whereby the plaintiff was marketing and selling the defendant's quarry stones and payment for the same would be made directly to the plaintiff. That as at 1st October 2006, the plaintiff's computation of the interest minus

payments received shows a cumulative debt of K11 351 544. 93. That Black Top Surfaces Ltd is owned by South African Nationals and all the shareholders and directors are resident in the Republic of South Africa. That the defendant has had serious managerial problems, is almost defunct and has not made any meaningful effort to settle the debt herein in full. That he is reliably informed that the defendant owes huge sums of money to other traders and is intending to quietly dispose of its properties with intent to abscond and defeat the plaintiff's and other creditors' claims. If the defendant would dispose most of its properties and become completely defunct, the plaintiff would be unable to recover the debt.

This application is made under Order VIII rule 1 of the Rules of the High Court. In as far as it is relevant to this application, the rule provides that:

“If the court, after issue of a writ, is satisfied that the plaintiff has a good cause of action and that the defendant, with intent to defeat or delay the claim of the plaintiff, has absconded or left Malawi, or is about to do so, or has disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so, or has willfully evaded or attempted to evade service of the process of the court upon him, the court may-

(b) order that attachment issue against the defendant's property, in all respects as if he were a judgment debtor, save and except that any property seized shall not be sold prior to judgment, unless subject to rapid decay or deterioration, or by leave of the court.”

Ordinarily this provision has to be invoked after issue of a writ but before judgment. The scenario in the present case is some what different. Judgment was already entered against the defendant, only that interest

has not been assessed yet. It is with respect to that interest that this application has been made. Can we invoke it?

The provision is meant to provide for attachment of the defendant's property before judgment. In the Courts Act "Judgment" is defined as including any decision, decree, determination finding or order of any court. (s. 2 Courts Act). I would think that an order on assessment of interest is equally a judgment under the Courts Act as an interim judgment for interest to be assessed. Therefore, this application is an application for an order of attachment of property before judgment properly brought under Order VIII rule 1 of the Rules of the High Court.

An interim judgment for interest having already been entered therefore, I only have to be satisfied that the defendant by his acts intends to defeat or delay the plaintiff's claim for interest. I get guidance from Mwaungulu J in ***Kamlesh Jogibhai Patel v. Mfumu Clothing Co. Ltd.*** Civil Cause No. 1002 of 2000 (Principal Registry) (unreported) at page 12 where he said:

"All disposition of property involves prejudice to a plaintiff who has a claim. The legislature could not have intended that a plaintiff's claim and right to redress stops the defendant from disposing his property. Equally, not all absconding is caught by the powers envisaged in sections 13 and 14 of the Courts Act and Order 8 of the Rules of the High Court. The difficulty is to isolate culpable action and disposition from the innocuous. The plaintiff must satisfy the High Court on oath that the disposition of property or conduct is intended to defeat or delay the plaintiff's claim. The intention must be established like all other intentions, that is, from words or conduct from which such an intention can be inferred. All turns out on the evidence and facts in a particular case. The evidence must be such that it can be said that the defendant's action and conduct are intended to defeat or delay the plaintiff's claim.

That is hardly, if at all, achieved just by evidence of disposition of property or abstention.”

Earlier at page 9 the Judge held that:

“Fourthly at the inter partes hearing the court, before ordering committal or attachment of property, should consider whether the defendant can furnish security. If the defendant can provide security for the claim it is an improper exercise of the discretion to commit to prison or attach property before judgment.”

No such security has been furnished by the defendant. I now proceed to consider whether the properties can be attached.

In his affidavit in opposition counsel for the defendant denies the allegation that the defendant wants to abscond. He states that it is nothing but an empty and desperate statement aimed at achieving some unknown objective. He further deposes that the defendant has not at any particular point in time expressed interest to dispose of its valuable properties despite calls from some quarters expressing interest to purchase the same.

In my judgment the fact that Black Top Surfaces Ltd is owned by South African Nationals and all shareholders and directors reside in the Republic of South Africa, and that it has had serious managerial problems, is almost defunct and has not made any meaningful effort to settle the debt herein in full which the defendant denies, does not show any intentions to defeat or delay the plaintiff's claim.

The affidavit in support deposes that the plaintiff is reliably informed that the defendant owes huge sums of money to other traders and is intending to quietly dispose of its properties with intent to abscond and defeat the plaintiff's and other creditors' claims. Order VIII rule 1 however, requires the court to be satisfied that the defendant has

disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so. Not merely an intention to do so. In the absence of clear evidence showing that the defendant is about to dispose of its properties I am not convinced of any intentions on the part of the defendant to defeat or delay the plaintiff's claim herein. No culpable conduct has been shown from which the intention can be inferred.

The application is dismissed with costs.

Made in chambers this 30th day of January 2007

T.R. Ligowe

ASSISTANT REGISTRAR