IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 521 OF 2007

Being Civil Cause no. 3511 of 2002 at the Principal Registry

BETWEEN

FINANCE BANK MALAWI LTD ……PLAINTIFF

-AND-

LLOYDS ELECTRICAL AND BUILDING CONTRACTORS ……DEFENDANT

CORAM : **T.R. Ligowe : Assistant Registrar**

Salima : Counsel for the Plaintiff

Kadzakumanja : Counsel for the Defendant

RULING

This action was commenced by writ in 2002 at the Principal Registry. It is basically for the sum of K1 110 480.25 plus interest thereon, being an amount owing by the defendants to the plaintiff following a loan agreement. The plaintiff further claimed K166 572.04 statutory collection charges, K33 314.41 surtax thereon and costs of the action. No defence having been served the plaintiff entered a default judgment on 24th January 2003 for the sums claimed. A writ of *fiery facias* was first issued on 11th February 2003. For

whatever reason there is another one that was issued on 30th July 2003. On 9th June 2004 execution was stayed pending an application to pay debt by installments. The application was filed the same day and heard on 21st June 2004 when it was dismissed. So a fresh writ of execution was issued on 28th June 2004. It not having been executed, another one was issued on 3rd February 2005. Then on 18th May 2007 the plaintiff applied to transfer the matter to Lilongwe Registry which was granted on 24th May 2007. When the matter was transferred to this registry, another writ of execution was issued on 8th August 2007 which was stayed on 15th August 2007 pending an application to set it aside.

Now the defendant applies to set aside the default judgment and the writ of execution under Order 13(9) of the RSC and the inherent jurisdiction of the court on two grounds.

(a) The judgment was entered for too much in that it includes collection charges and surtax thereon which are not claimable after action is commenced.

(b) After the plaintiff company went into liquidation sometime in 2005 it has no *locus standi* to proceed with the case.

On the first ground they argue that under the authority of ***J.L. Kankhwangwa et al v. Liquidator Import and Export (Malawi) Ltd,*** MSCA Civil Appeal Cause No 4 of 2004 (unreported) a plaintiff is not entitled to indemnity for legal collection costs after action commenced. Therefore the judgment was entered for too much. It is irregular and must be set aside *ex debito justitiae.* To this counsel for the plaintiff contends that the default judgment is regular. He cites ***Associated Supplies v Malawi Electoral Commission*** Civil Cause No. 840 of 2005 (Principal Registry) (unreported) where Justice Katsala said at page 3:

> "Let me concur with the defendant that indeed the 15% collection costs … is not claimable from the defendant in terms of our law, ***Kankhwangwa and others***

v. Liquidator Import and Export (Malawi) Ltd, MSCA Civil Appeal Cause No 4 of 2004 (unreported). However in my considered view, that per se does not render the judgment irregular. Since the claim for the collection costs was indorsed on the writ the default judgment complies with Order 13 r. 1 RSC. I don't think it would be correct to say that judgment was entered for too much simply because it includes an amount tin respect of a claim that is misconceived or is not tenable under our law."

Counsel contends that since the claim for statutory collection charges was indorsed on the writ then the judgment is not irregular.

I am mindful that I am bound by the decision of the Judge. However I would choose to depart a little bit in view of what I will be saying below.

Order 13 rule 1(1) of the RSC provides that a default judgment can be entered for a sum not exceeding that claimed by the writ in respect of the demand and for costs. While that is the position, it is trite that the amount for which a default judgment should be entered must be limited to the amount actually due at the time when judgment is being entered. Paragraph 13/1/3 of the RSC on the "Amount for which judgment should be entered" states:

"Rule 1 states that the plaintiff may enter judgment "for a sum not exceeding that claimed by the writ in respect of the demand and for costs". The amount for which judgment is entered should be carefully limited to the amount actually due at that time, and credit should be given for payments made after action brought. If a cheque is accepted after the writ is issued, the judgment must not include the amount of the cheque during its currency, otherwise it will be irregular and may be set aside *ex debito justitiae* (***Bolt & Nut Co. (Tipton) Ltd v. Rowlands Nicholls & Co. Ltd*** [1964] 2 Q.B. 10, CA). … If the plaintiff enters judgment in default for more than the sum actually due, and does not correct the error under O.20, r.11, the defendant is entitled *ex debito justitiae* to have the judgment set aside (***Hughes v. Justin*** [1894] 1 Q.B. 667). Bankruptcy proceedings instituted upon such a judgment were held to be bad, even though the bankruptcy notice was for the correct amount (***Muir v. Jenks & Co.*** [1913]

2 K.B. 412, CA). If the whole debt has been paid, the judgment should be for the costs alone (***Hughes v. Justin*** [1894] 1 Q.B. 667). Where by inadvertence on the part of the officer judgment in default was entered for the debt and for a sum of fixed costs in excess of what the plaintiff was properly entitled to, and the defendant applied to set aside the judgment, the court has power under O.20, r.11, on such an application to order the judgment and subsequent proceedings to be amended instead of setting it aside (***Armitage v. Parsons*** [1908] 2 K.B. 410, CA)."

The reading of the provision gives two options to a judgment entered for too much. It is either set aside or amended. Obviously, a plaintiff should not be entitled to execution for an amount that is not due to him. That would create problems.

While it is like that the judgment in this case was entered on 24th January 2003 and the ***Kankhwangwa case*** was first decided on 22nd December 2003 way before the judgment in question in this case. And we all know that law does not operate retrospectively. So the rule in the ***Kankhwangwa case*** would not apply to the present case. However Counsel for the plaintiff in his submission was prepared to have the judgment varied in view of the purported irregularity. So it is hereby ordered that the default judgment be varied to exclude the K166 572.04 statutory collection charges and K33 314.41 surtax thereon.

On the second ground the defendant relies on S. 258(2) of the Companies Act. It is stated in the affidavit in support that sometime in 2005 the plaintiff company went into voluntary liquidation. Section 258(2) of the Companies Act provides that after the commencement of the winding up of a company no action or proceeding shall be proceeded with or commenced against the company except by leave of the court. Their argument is that after the liquidation no leave was obtained and so the plaintiff has no capacity to proceed with the case. The plaintiffs argue that the provision is a mere

formality and it is never followed strictly. They cite ***Finance Bank of Malawi v. I.I. Logart and Midway Service Station (Pvt) Ltd MSCA*** Civil Appeal No. 25 of 2006 which went up to the supreme court without need for leave. With due respect that is not the position. The company meant under Section 258(2) of the Companies Act is the company against which an action or proceeding is proceeded with or commenced and not the company that is itself bringing action. That is why there was no problem with ***Finance Bank of Malawi v. I.I. Logart and Midway Service Station (Pvt) Ltd MSCA.*** A reading of ***Langley Constructions Ltd v. Wells*** [1969] 2 All ER 46 clearly shows that a company in liquidation can itself commence action but no action can be commenced or proceeded with against it without leave of the court. Our S. 258(2) of the Companies Act is similar to Section 231 of the Companies Act 1948 of England and commenting on that section in the ***Langley case,*** Widgery L.J. said at page 47:

> "The purpose of S.231 is clear and has not been challenged in argument. It is to ensure that when a company goes into liquidation the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company."

So, in my judgment the defendant misconceived S. 258 of the Companies Act and therefore that ground can not stand in the present case.

The default judgment in this case therefore can not be set aside but varied in view of the concession made by counsel for the plaintiff.

Costs are for the plaintiff.

Made in chambers this 20th day of May 2008.

T.R. Ligowe
ASSISTANT REGISTRAR