



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 310 OF 1998

BETWEEN

EXIMBO (PTY) LIMITED.....CLAIMANT

AND

A.G.A KARRIM & SONS LIMITED.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA

Dr. Chagwanjira, of Counsel for the Claimant

Mr. Chakuwawa, of Counsel for the Defendant

Mr. Chimtengo, Official Interpreter/Court Reporter

RULING

On the 30th of September 2019, the claimant made an application for an order of sale of title number Chichiri 245 under sections 33 and 42 of the Sherriff's Act. In the sworn statement in support by Dick Chagwanjira dated 6th February 2020, it is stated that on the 24th of February the claimant obtained judgment against the defendant for the sum of \$15,046.00. The Sherriff of Malawi levied execution on the defendant's movable property but the judgment remains unsatisfied. The claimant further obtained and registered an inhibition against the Chichiri 245 and still the judgment remains unsatisfied and more than 6 months have elapsed. The claimant believes that a statutory right has arisen in favour of the claimant for the sale of title number Chichiri 245 hence the application herein.

The defendant opposes the application. In a sworn statement in opposition by Counsel Chakuwawa it is stated that on the 18th of May 2007, the claimant registered inhibition orders on title numbers Chichiri 45, Chichiri 244 and Soche West 1432 requiring the defendant to settle the judgment debt in the sum of \$15,046. He exhibits copies of the inhibition orders. He depones that the same was already paid to the claimants by the defendant on 7th March 2008. He exhibits a Consent Order dated 10th March 2008 and Payment Voucher dated 7th March 2008. He further depones that in view of the said payments the inhibition orders were discharged. He contends that the application by the claimant is without merit considering that the judgment debt was already paid.

The defendant is also relying on the sworn statement by Aftab Ahed Ibrahim Panjwani who deposes that he is the Administrator of the Estate of Ibrahim Abdul Gani Panjwani a former director of the defendant. He depones that the claimant was deregistered in Botswana on the 5th of July 2016. He exhibits a copy of the confirmation of the deregistration. He further depones that from the moment the claimant was deregistered it lost its legal personality such that all legal proceedings brought for and/or against the claimant were extinguished automatically and in the same vein all debt for and/or against the claimant became unenforceable. He contends that all steps taken in this matter after the deregistration on 5th of July 2016 were irregular. He observes that assessment of damages for loss of profit and loss of business and the order on assessment; application for the inhibition order on the defendant's property number 245 and the inhibition order; summons for sale of property number Chichiri245 were done after the claimant was deregistered and were irregular and should be set aside as such.

The defendant further relied on the sworn statements by Gotsilemotho Winnie Phuduhudu. In the sworn statement filed on the on 24th February, 2020, she depones that on the 13th of November 2019 she conducted a search at the Companies and Intellectual Property Authority of Botswana (CIPA) situate at Plot No. 54358, block A, Prime Plaza, Central Business District, Gaborone, Botswana. The purpose of the search was to determine whether Eximbo (Proprietary) Limited of Company Number Number CO1987/8033 (EXIMBO) validly exists and is incorporated under the Laws of Botswana. She further depones that upon conducting the aforesaid search from the Companies Register on the 5th of July 2016 due to non-compliance with the Companies Act (Cap 42:01). She was issued a letter by CIPA confirming the above. She exhibits the letter attached to her sworn statement.

In another sworn statement, filed on the on 17th March, 2020, Gotsilemotho Winnie Phuduhudu depones that on 10th March 2020, she conducted an online company search on CIPA's online business registration platform. The purpose of the search was to determine whether Eximbo (Proprietary) Limited Company Number

CO1987/803 (Eximbo) which was deregistered has been re-registered. Upon conducting the aforesaid search, she found a company called Exim Botswana (Proprietary) Limited of Company number BW0000343770 (Exim). Exim is a re-registration of a company that was initially incorporated in 1988 and the re-registration is indicated on the company extract. The re-registration was done on 18th July 2019 and the directors are Zafrullah Khan Rakesh Panicker. She exhibits a copy of the Company Extract marked "GQP1". She further depones that she also found a company called Eximbo (Proprietary) Limited Company Number BW00001502672. She avers that the company is a newly registered company. The company was incorporated on 3rd March 2020 and the sole director and shareholder of the company is Jean Paul W. De Ryekman de Betz. She exhibits a copy of the company extract marked GQP2. In view of the foregoing, she avers that Eximbo (Proprietary) Limited Company Number CO1987/803 (Eximbo) was not registered but a new company called Eximbo (Proprietary) Limited Company Number BW00001502672 was incorporated on 3rd March, 2020.

In response, the claimant relies on a sworn statement by Leah Ng'oma Jere of Counsel in the firm of Messrs Jere and Associates in Botswana in which she avers that she was advised that since last registration system for companies in Botswana changed to the effect that both old and new companies had to undergo new online registration to such extent that even companies which owed Returns, such Returns were waived and all companies would now have new registration numbers. She further depones that the exercise is still going on and that in the current certificate of incorporation the company registration numbers have also changed. There is now a unique identification number. She further depones that the company is fully registered even under the new re-registration system. She exhibits a copy of Certificate of Incorporation for Eximbo (Pty) Ltd and other extracts with respect to Shareholding and directorship.

She also depones that CIPA is no longer using old company numbers. She points out that there is a code and profile details that CIPA gives which enable anyone to access the Certificate and other documents in relation thereto online anywhere in the world. She explains that the effect of the online registration is that there is no certification of Certificates of Incorporation or any document relating to companies a whosoever has a company profile and code with CIPA can access them online for confirmation. She adds that the company obligation both present and past are reinstated and she has to that effect written to the Registrar of CIPA to confirm that the company's shareholding and directorship for Eximbo (Pty) has not changed.

From the foregoing, what seems to come out is that the claimant has made an application to enforce a judgment debt for the sum of \$15,046.00 plus its interest. They had registered an inhibition against the Chichiri 245 and they believe the judgment remains unsatisfied and more than 6 months have elapsed. The defendant contends

that the judgment debt was fully paid and there is a consent order to that effect. They further contend that the company the legal practitioners purport to represent was deregistered. In a retort, the claimants seek to impeach the sworn statements relied upon by the defendants in advancing their case in that they do not comply with the Rules. In essence, the questions that this court ought to address are:

- a. Whether or not the sworn statements relied upon by the Defendant are irregular, offend rule against hearsay evidence and are inadmissible.
- b. Whether or not the Claimant was re-registered on 3rd March, 2020 and hence capable of enforcing the Judgment Debt in dispute.
- c. Whether or not, in the circumstances, the Claimant can rely on equity to enforce the Judgment debt.

With regard to the first question for determination on whether or not the sworn statements relied upon by the Defendant are irregular, I take note that Counsel for the claimant queries the two statements of Counsel Phuduhudu and that of Counsel Chakuwawa of the defendant. He argues that the sworn statement of Counsel Phuduhudu does not say that Eximbo PTY Limited is a newly registered company. He argues that there is nowhere in both exhibits produced by Phuduhudu showing such assertions hence being inadmissible as hearsay evidence because this is coming from the deponent herself as she is not only relaying information but interpreting the contents thereof. He submits that this is a factual issue that cannot be derived from the document as a public document without disclosing its sources. He is of the view that this offends order 17 rule 55(56) of the Rules where notice was supposed to be given for the deponent's intention to rely on hearsay evidence.

In my opinion, the assertions in the sworn statements are not hearsay evidence. Phuduhudu depones to matters relating to the search that she herself conducted and the results that she obtained. She exhibits the results of her search in form of a public document that cannot be caught by the rule against hearsay evidence. For a document to be classified as an admissible public record it must satisfy four requirements namely; (a) the document must be available for public inspection, (b) the person compiling the document must be under a public duty to satisfy himself of the truth of the statement, (c) the document must concern a public matter for example a company's statutory returns and (d) the document must have been created to be permanent not temporary. See **Harold Bauleni and 16 Others vs. Siku Transport and another, Personal Injury Cause Number 299 of 2014.**

Further to that, I do not believe that it is true that the sources of the documents in question have not been disclosed. The witness succinctly indicates that she conducted a search at the Companies and Intellectual Property Authority of Botswana (CIPA) which is a public official website. In fact, the claimant acknowledges this because in their submissions they contend that the statement ought to have been corroborated by someone from CIPA to speak from his knowledge of the processes of registration. Speaking of which, I may be looking at the issue superficially but I really do not see the need for corroboration on matters to deal with registration processes when the documents actually speak for themselves.

On the sworn statement by Counsel Chakuwawa, the claimants contend that the same contains evidence gathered on the CIPA website as such it is hearsay because it is not based on any official search. He argues that information on a website can be changed at any time and hence lacks the element of permanence as per requirements of constitution of public documents in the case of **Harold Bauleni and 16 Others vs. Siku Transport and another**. On this point, I agree with the defendants that documents cannot cease to be public documents simply because they are from a website. The fact that the documents are on a website does not mean that their content are not meant to be permanent. It is therefore, not true that the documents fail to meet the permanence requirement as alleged by the Claimant.

On the other hand, Counsel for the claimant argues that the sworn statement by Counsel Chakuwawa on paragraph 3 and 4 tries to establish the truth of what the document is saying and not what is appearing on the document. He submits that the two exhibits KC1 and KC2 have no indication that Eximbo Pty Limited was registered as a new company and that Eximbo Botswana Proprietary Limited is an old company. He argues that the assertion that the document says that the company is a new company may only be said by the authors of the document and in this respect CIPA. Counsel submits that such evidence is inadmissible as it concludes the hearsay as the deponent has no evidence to confirm that such assertions from the authors. He cites the case of **Subramaniam v Public Prosecutor** (1956) 1 WLR 965 support of his assertion.

What struck this court as strange is the selective application of the principle against hearsay by Counsel for the claimant. The documents being referred to are Company Extracts for Eximbo Proprietary Limited and Exim Proprietary Limited. During oral submissions the counsel Chagwamnjira expressly admitted that the Company Extracts exhibited by one Leah Ng'oma Jere were public documents. The Company Extract for Eximbo Proprietary Limited that Leah Ng'oma Jere exhibited is the same document exhibited by the deponent herein. It is surprising that the same document ceases to be a public document simply because it has been exhibited to advance the claimant's case. As already stated above, the documents having been obtained from a public official

website, CIPA, the same are public documents and can be tendered by everyone such that issues of hearsay evidence do not arise.

On a similar note, the Claimant is arguing that Counsel Chakuwawa and Counsel Phuduhudu should not have sworn the sworn statement herein because they are legal practitioners for the Defendant. It is submitted that the deponents being attorneys cannot be a mouthpiece for the defendant as they are not members of staff or the directors of the company to bring evidence on behalf of it. However, as it can be seen above Dick Chagwanjira and Leah Ng'oma Jere have made sworn statements and yet they are both Legal Practitioners for the Claimant. There is no explanation as to why the sworn statements made on behalf of the defendant should be expunged while those made on behalf of the claimant should be allowed considering that all deponents are legal practitioners. This court is compelled to ignore this contention.

Lastly, the Claimant alleges that the supplementary sworn statement is irregular because it is not signed, the pages are not numbered consecutively and that the exhibits are not identified and are not stamped. Having perused the said sworn statements, it is not true that the supplementary sworn statement is not signed. The deponent properly signed the supplementary sworn statement on page 2 of the supplementary sworn statement. Should the fact that the signature is not placed right at the end, render it inadmissible? Furthermore, the supplementary sworn statement is properly paginated and properly notarised. The exhibits are also properly identified using initials of the deponent followed by a number, in line with **O.18 r 7 of CPR 2017**. It was observed that the copy of the supplementary sworn statement that the Counsel Dick Chagwanjira had in court during the hearing had misplaced pages although the pages are properly numbered. There is a higher probability that the misplacement of the pages in the Claimant's copy of the supplementary sworn statement was done by the Claimant themselves during photocopying considering that the copies of the supplementary sworn statement that the Defendant had and that which is on the court file have their pages properly arranged.

Finally, the basis of the present application is on the order of assessment for the damages of loss and profit which was assessed on 24th of February 2017 at \$156,958.48. The claimant contend that the order has not been honored till today and that was the basis of the inhibition order that was made which order is required to be effected now. They submit that the requirement under the Sheriff Act ss.33, 35, 36 and 40 with necessary modifications to enforce judgment against registered land in the land registry has been made. it is submitted that equity will not ignore statutory requirements normally where it would be unconscionable to allow a party to rely on a statutory requirement to another's detriment. They further submit that the claimant has taken necessary steps to put back the company that was then deregistered within the action had been taken. They

contend that equity will not suffer a wrong to be without a remedy. They are of the view that the defendant would want to deprive the claimant to obtain what is justifiably his legal right to claim his loss of profit and loss of business through an inhibition order of sale of Title Number Chichiri 245.

On the issue whether the judgment debt remains unsatisfied triggering the sale of title number Chichiri 245, the Defendant submits that the said Judgment debt was already settled and that the Claimant's application should therefore be dismissed. However, I notice that the consent order dated 10th March 2008 relied upon by the defendant is in relation to Title numbers Chichiri 244, Chichiri 45 and Soche West 1432. The said properties were under an inhibition order obtained for the payment of \$15,046.00. I take note that in Counsel Dick Chagwamnjira's sworn statement filed on 6th March, 2020 on paragraph 8.9, it is stated that the judgment debt being enforced is \$156,000.00 which was interest assessed on the \$15,000 principal sum. The question perhaps is whether the Claimant has complied with the requirements under sections 33 and 42 of the Sheriffs Act regarding the US\$156,000.00 judgment debt. I would have ordered that the court be addressed exhaustively on this issue before proceeding however I still have in mind the contention that the claimant was deregistered.

The defendant contends that the claimant no longer exists a thing which extinguishes the claimant's legal representatives' authority to continue acting for the claimant. The evidence of Aftab Ahed Ibrahim Panjwani is to the effect that the claimant was deregistered in Botswana on the 5th of July 2016. He exhibits a copy of the confirmation of the deregistration marked "AAIP2". However, through the evidence of Leah Ng'oma the claimant seeks to show that the Company was incorporated on the 3rd March, 2020. It would appear that the registration of Eximbo Proprietary Limited that happened on 3rd March, 2020 was an incorporation of a new company and not a re-registration by the claimant. There is evidence showing different directorship and shareholding. In my considered opinion, we may not be dealing with a continuation of a company but two different companies. In my view, since there is no evidence that the Claimant was re-registered the Claimant's previous rights and obligations ceased to exist. In view of this, the claimant's application is dismissed with costs to the defendant to be borne by the claimant's legal practitioners.

DELIVERED IN CHAMBERS THIS 16th DAY OF NOVEMBER 2020


WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR